APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-36660

D.C. No. CV-89-1732-R

UNITED STATES OF AMERICA, *ex rel.*
KEVIN G. KELLY,
Plaintiff-Appellant,

v.

THE BOEING COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted April 7, 1993
Pasadena, California

Filed September 7, 1993
Amended: November 5, 1993

AMENDED OPINION

Before: HALL, WIGGINS and LEAVY, Circuit Judges

Opinion by Judge Hall

HALL, Circuit Judge:

This appeal presents several constitutional challenges to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729 et seq. The question of the constitutionality of the qui tam provisions is one of first impres-

sion in this circuit. We hold that these provisions do not exceed the limitations of Article III of the Constitution, nor do they violate the constitutional principle of separation of powers, the Appointments Clause of Article II, or the Due Process Clause of the Fifth Amendment.

I. OVERVIEW AND BACKGROUND

The Boeing Company ("Boeing") appeals the district court's denial of its motion to dismiss a qui tam action under the False Claims Act ("FCA" or "the Act"). Qui tam plaintiff Kevin G. Kelly filed the action against Boeing on behalf of the United States to recover damages and penalties for allegedly fraudulent charges to the United States. Boeing claimed in its motion to dismiss that the district court lacked jurisdiction over Kelly's suit because the provisions of the FCA which authorize qui tam actions are unconstitutional.

The district court rejected Boeing's four constitutional challenges to the FCA, but certified an interlocutory appeal of its rulings on the constitutional issues. We granted permission to appeal pursuant to 28 U.S.C. § 1292(b). We have considered and likewise rejected Boeing's arguments. Therefore, we affirm.

A. *Facts and Proceedings Below.*

In November 1989, Kelly, a former Boeing employee, filed a complaint under seal alleging that Boeing committed various violations of the False Claims Act related to its work as a subcontractor on the government's B-2 Bomber and Advanced Tactical Fighter programs. Kelly claimed that Boeing improperly charged to the government certain facilities lease costs. Kelly served his complaint on the government, as required under the Act, after which the government investigated his allegations for over three years. Upon completing its investigation, the government elected not to intervene in the case. The district court then unsealed the case, and Kelly served

on Boeing an amended complaint. Boeing then moved to dismiss, raising the four constitutional challenges that it pursues in this appeal. The district court denied Boeing's motion,[1] and certified the constitutional issues for immediate appeal to this court.

B. *The Qui Tam Provisions of the FCA.*

The FCA, which Congress originally enacted in 1863, is the government's "primary litigative tool for combatting fraud" against the federal government. Senate Judiciary Committee, False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. 31 U.S.C. § 3730 (1988). Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act and thereby to enlist the aid of the citizenry in combatting the rising problem of "sophisticated and widespread fraud."[2] S. Rep. No. 345 at 2, 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5267, 5288-89.

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government. The action shall be brought in the name of the Government." 31

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[1] The district court granted Boeing's motion to dismiss a state law wrongful discharge claim included in Kelly's amended complaint. Kelly does not contest that ruling.

[2] The legislative history indicates that Congress sought to encourage more private enforcement of the FCA because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. Rep. No. 345 at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

U.S.C. § 3730(b)(1). An action under this provision is termed a "qui tam" [3] suit, and the person who brings such an action is referred to as a "relator" or "informer". If the government files an action to enforce the FCA, a would-be relator may not later bring any action based on the same underlying facts. 31 U.S.C. § 3730(e)(3). Nor may a private party litigate a qui tam suit based on the public findings of a government investigation or on disclosures in the news media, unless that party is an original and independent source of the information on which the complaint is based. *Id.* § 3730(e)(4)(A)-(B).

Upon bringing a qui tam action, a relator must serve on the government a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses. The complaint must be filed in camera and remain under seal for at least 60 days so that the government may investigate the relator's allegations, though upon a showing of "good cause" the government may move the court for extensions of the 60 day period. *Id.* § 3730(b)(2), (3). By the end of the period provided for the government's investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the Government," *id.* § 3730(b)(4)(A), or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

The Act explicitly provides that if the government takes over the qui tam action from the start, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing

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[3] The term "qui tam" is short for "qui tam pro domino rege quam pro se imposo sequitur," which is interpreted as "who brings the action as well for the king as for himself." *Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 305 (S.D. Tex. 1971).

the action." *Id.* § 3730(c)(1). Though the relator "shall have the right to continue as a party," *id.*, the government may end the litigation or limit the participation of the relator in several ways. First, the government may dismiss the action "notwithstanding the objections of the person initiating the action" once the relator has received notice and an opportunity for a hearing on the dismissal motion. *Id.* § 3730(c)(2)(A). Second, the government may settle with the defendant "notwithstanding the objections of the person initiating the action," but only if the court determines after a hearing "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B). Third, the government may request that the court impose appropriate limitations on the relator's participation if it shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." *Id.* § 3730(c)(2)(C). The Act also provides the defendant an opportunity to request that the court limit the relator's participation, upon a showing that unrestricted participation "would be for purposes of harassment or would case the defendant undue burden or unnecessary expense." *Id.* § 3730(c)(2)(D).

When the government chooses not to take over a qui tam action, the relator "shall have the right to conduct the action." *Id.* § 3730(c)(3). Upon the government's request, however, the relator must serve the government with copies of all pleadings and deposition transcripts. Whether or not the government takes over the action from the outset, it may ask the court to stay the relator's discovery for an extendable 60-day period, upon a showing that the relator's discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.* § 3730(c)(4).

In cases where the government initially elects not to take over the action, the court "may nevertheless permit

the Government to intervene at a later date upon a showing of good cause." *Id.* § 3730(c)(3). In permitting late intervention, the court may not limit "the status and rights" of the relator. *Id.* The parties and amici in this appeal raise two questions concerning this particular aspect of the qui tam provisions. First, they dispute the height of the "good cause" hurdle. Second, they dispute the meaning of the proviso that the court may not limit the relator's "status and rights." Boeing claims that this proviso means the relator retains primary authority to conduct the action, whereas Kelly claims that this simply means the relator retains the right to participate as a party to the litigation.[4] Both questions relate to the broader issue, addressed in the discussion section of this opinion, concerning the extent of the government's ability to exert control over a qui tam suit.

The Act provides for a range of possible awards to successful qui tam plaintiffs. In actions which the government has taken over, the relator receives between 15 and 25 percent of the proceeds of the action or settlement of the claim. But if the court finds that the action is based primarily on information of which the relator is not the original source, the relator's award must be limited to no more than 10 percent of the proceeds or settlement. In actions in which the government has not intervened, the relator receives between 25 and 30 percent of the proceeds or settlement. In any of the above situations, the relator also receives an amount for reasonable expenses, attorneys' fees and costs, awarded against the defendant rather than taken out of the proceeds or settlement. *Id.* § 3730(d)(1), (2). On the other hand, an unsuccessful relator in a case in which the government has not intervened may be ordered to pay the defendant its reasonable attorneys' fees and expenses if the court

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[4] Kelly argues that § 3730(c)(3) "simply secures the party status and percentage award to which the relator would have been entitled had he continued to litigate the case without government intervention."

finds that the relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *Id.* § 3730(d)(4).

II. STANDARD OF REVIEW

We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States,* 488 U.S. 361, 384 (1989) (quoting *Bowsher v. Synar,* 478 U.S. 714, 736 (1986) (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications Workers of America v. Beck,* 487 U.S. 735, 762 (1988). Our adherence to this principle of presumptive constitutionality is guided by our understanding that "[w]hen we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick,* 448 U.S. 448, 472 (1980) (citation omitted).

III. DISCUSSION

A. *Standing.*

1. Article III Requirements.

We first address the threshold question of justiciability —whether a qui tam plaintiff has standing to sue under the FCA. Article III, section 2 of the Constitution limits the judicial power of the United States to the resolution of cases and controversies. The doctrine of standing is used to determine whether a conflict qualifies as a case or controversy and is therefore capable of judicial resolution. *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130, 2136 (1992). Standing, in turn, is dependent on three conditions. First, the plaintiff must have suffered an "injury

in fact." This consists of an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent. Second, there must be a causal connection between the injury and the conduct serving as the basis of the lawsuit. In other words, the injury has to be traceable to the challenged action of the defendant and not the result of the conduct of a third party not before the court. Third, it must be likely that the injury will be redressed by a favorable decision. *Id.*

Boeing and amici curiae argue that the only injuries implicated in qui tam suits are injuries to the federal treasury resulting from false claims against the United States. Qui tam relators do not suffer harm, and are therefore unable to establish the constitutional elements of standing. It follows that by granting standing to private parties, the FCA's qui tam provisions run afoul of Article III and are unconstitutional.

We disagree and hold that the FCA effectively assigns the government's claims to qui tam plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury. Under this theory of standing, the FCA's qui tam provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit. If the government declines to prosecute the alleged wrongdoer, the qui tam plaintiff effectively stands in the shoes of the government. Because the government clearly is capable of establishing injury-in-fact, causation, and redressability, qui tam plaintiffs satisfy these Article III requirements as well.

Several courts and commentators have embraced this assignment theory. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corporation,* 985 F.2d 1148 (2d Cir.), *cert. denied,* 113 S. Ct. 2962 (1993); *United States Dept. of Housing and Urban Develop. ex rel. Givler v. Smith,* 775 F. Supp. 172, 180-81 (E.D. Pa. 1991); *Truong v. Northrop Corporation,* 728 F.

Supp. 615, 618-620 (C.D. Cal. 1989); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act,* 57 U. Chi. L. Rev. 543, 563-70 (1990). Moreover, this theory comports with federal practice. Federal courts routinely find that fraud claims are assignable. *See Amerifirst Bank v. Bomar,* 757 F. Supp. 1365, 1370-71 (S.D. Fla. 1991) (10b-5 claims assignable); *Federal Deposit Ins. Corp. v. Main Hurdman,* 655 F. Supp. 259, 266-68 (E.D. Cal. 1987) (bank's actions for fraud and malpractice assignable to FDIC); *In re National Mortg. Equity Corp.,* 636 F. Supp. 1138, 1152-56 (C.D. Cal. 1986) (RICO treble damage claims assignable). In addition, federal courts consistently recognize that an assignee of a fraud claim can assert his claim despite being unable to satisfy traditional standing requirements. *Amerifirst Bank,* 757 F. Supp. at 1370; *Main Hurdman,* 655 F. Supp. at 267. *See also National Ass'n of Realtors v. Nat. Real Est. Ass'n,* 894 F.2d 937, 941 (7th Cir. 1990).

Boeing and amici curiae argue that it strains reason to suggest that Congress was attempting to make a legal assignment through the FCA. They emphasize that the word "assignment" does not appear in the statute, and that no other language suggests that Congress was attempting to bestow a contractual right on the plaintiffs.

We disagree. It is well established that terms of art are not required for a valid assignment. "[T]he assignor need not even use the word 'assign'." Allan E. Farnsworth, *Contracts* § 11.3, at 786 (2d ed. 1990). Instead, the parties' intent controls. *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau,* 701 F.2d 1276, 1283 (9th Cir.), *cert. denied,* 464 U.S. 822 (1983). We conclude that Congress intended to assign the government's fraud claims to individual qui tam plaintiffs in cases where the government itself chooses not to pursue such claims. The express language of the FCA gives relators the right to bring suit on behalf of the government. Moreover, the entire purpose of the FCA's qui tam provisions is to em-

ploy the help of individuals to uncover fraud against the government.

We are unconcerned that the assignment of the government's claim is contingent on a qui tam plaintiff filing suit, that the qui tam plaintiff is only assigned part of the government's claim, and that the government retains the right to intervene. Assignments can be made conditional on the occurrence of a future event. Farnsworth, § 11.3, at 789. In addition, the fact that the relator is only entitled to a maximum of thirty percent of the total recovery of a qui tam suit is insignificant. This court has observed that "[a]n assignment of claims does not prevent the assignors from receiving the benefits of the litigation." *Klamath-Lake Pharm.*, 701 F.2d at 1282. Finally, the government's retention of the right to intervene in a relator's action upon a showing of good cause is completely consistent with the rule that an assignment may be limited in its effect. Farnsworth, § 11.3, at 789.

2. *Policy Concerns.*

Thus, we hold that the FCA's qui tam provisions do not run afoul of Article III. Consideration of the policy concerns underlying the standing doctrine supports this conclusion. In *Allen v. Wright,* 468 U.S. 737, 752 (1984), the Supreme Court explained that "the law of Art. III standing is built on a single basic idea—the idea of separation powers." Standing ensures that federal courts maintain their properly limited role in a democratic society by requiring that cases are presented in an adversarial context and in a form historically viewed as capable of judicial resolution. *Flast v. Cohen,* 392 U.S. 83, 95 (1968).

Qui tam suits are presented in the traditional adversarial context. They involve concrete factual disputes which prevent the federal courts from being converted into "judicial versions of college debating forums" issuing abstract opinions. *Valley Forge Christian College v.*

Americans United for the Separation of Church and State, Inc., 454 U.S. 464, 473 (1982). In addition, qui tam plaintiffs have the requisite personal stake in the outcome of the case to ensure that the issues are presented sharply and that more than "the vindication of the value interests of concerned bystanders" is at issue. *Id.* This personal stake derives from the following three factors: (1) the qui tam plaintiff must fund the prosecution of the FCA suit; (2) the qui tam plaintiff receives a sizable bounty if he prevails in the action; and (3) the qui tam plaintiff may be liable for costs if the suit is frivolous. *Kreindler & Kreindler*, 985 F.2d at 1154.

Qui tam suits also are capable of judicial resolution. They involve allegations of fraud—an area of law that is neither novel nor extraordinarily complex. By resolving these suits, federal courts are not intruding into areas committed to the other branches of government. Instead, they are merely accommodating a congressional policy decision that relators may sue on behalf of the government for violations of the FCA. As we explain more fully in the next section of this opinion, in no way does this upset the tripartite allocation of power upon which our government is based. *Givler*, 775 F. Supp. 172, 180-81.

B. *Separation of Powers.*

We next consider whether the qui tam provisions of the FCA violate the principle of separation of powers. The FCA's grant of authority to private parties to sue in the name of the United States for injuries to the federal treasury is certainly anomalous with respect to normal divisions of authority. But the question in this case is not whether the qui tam provisions fit neatly into usual public power distribution patterns; rather, the question is whether the Constitution *prohibits* use of this mechanism of civil law enforcement. To answer that question, we must determine whether Congress, under its policymaking

authority, may place the prosecution of claims based on injuries to the government under the direction of qui tam relators.[5] In other words, we must decide whether the separation of powers principle inherent in the structure of the Constitution proscribes assignment of this essentially prosecutorial function to private parties.

1. General Principles.

The principle that the various powers of government must be separated and assigned to coordinate branches is fundamental to our form of government. The Framers, aware that concentration of power breeds tyranny, embedded the separation of powers principle into the Constitution in order to preserve liberty. The Supreme Court has repeatedly pronounced upon the importance of this principle in our constitutional scheme. *See e.g., Mistretta*, 488 U.S. at 380 ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."); *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2634 (1991); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991).

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[5] In *United States, ex. rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943), the Supreme Court held, referring to the FCA qui tam provisions, that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it. . . ." We do not believe this to be conclusive authority on the questions we address in this opinion for several reasons: the Court did not squarely face the constitutional issues presented in our case; the Court's jurisprudence regarding these issues has developed significantly since 1943; and Congress has substantially amended the FCA twice since the *Hess* decision.

The Supreme Court has also consistently recognized that "the Constitution by no means contemplates total separation" of the three branches of government. *Buckley v. Valeo,* 424 U.S. 1, 121 (1976). Because the Court has acknowledged that a workable government requires a degree of interdependence and overlapping responsibility, the Court has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' " *Morrison,* 487 U.S. at 694 (quoting *United States v. Nixon,* 418 U.S. 683, 707 (1974)). Nevertheless, the Court has "not hesitated to invalidate provisions of law which violate" the separation of powers principle. *Id.* at 693; *Buckley,* 424 U.S. at 123. We understand that, likewise, we must not hesitate to do so.

This case does not involve the type of separation of powers problem posed by one branch of government arrogating power at the expense of another. *See Mistretta,* 488 U.S. at 382 ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' ") (citation omitted); *Morrison,* 487 U.S. at 693; *Freytag,* 111 S. Ct. at 2638. Instead, this case requires us to determine the extent to which the legislative branch may, while remaining within constitutional boundaries, diminish the executive branch's authority without taking any of that authority as its own.

The Supreme Court has recognized that the separation of powers doctrine can be violated by "provisions of law that *either* accrete to a single Branch powers more appropriately diffused among separate Branches *or* that undermine the authority and independence of one or another coordinate Branch." *Mistretta,* 488 U.S. at 382 (emphasis added). It is the second type of violation that is at issue in this case. Although the Supreme Court has had occasion to address whether an act of Congress has

triggered this type of violation, *see Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, 856-57 (1986) (case raised no question of congressional aggrandizement but instead question whether Congress impermissibly undermined role of judicial branch); *Morrison,* 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."), it has never considered a situation where Congress has sought to disperse some quantum of executive authority amongst the general public.

2. Applicable Tests.

The Supreme Court has established that where an act of Congress arguably threatens the integrity of another branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. *Schor,* 478 U.S. at 856. This is the test which we apply to the qui tam provisions of the FCA. In order words, we must consider whether the qui tam provisions " 'disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.' " *Morrison,* 487 U.S. at 695 (quoting *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977)). To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether, within the meaning expressed in *Morrison,* these provisions accord the Executive Branch "sufficient control" over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties." [6] *Morrison,* 487 U.S. 696.

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[6] For purposes of this case, the relevant presidential duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3,

3. Comparison to *Morrison v. Olson*.

The authority most analogous to this case is *Morrison v. Olson*, in which the Supreme Court held that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the functions of the Executive Branch in violation of the separation of powers principle. 487 U.S. at 697. *Morrison* provides a baseline against which we may assess whether Congress has unconstitutionally diminished executive power by permitting private plaintiffs to sue in the name of the United States for an injury to the federal treasury. Comparison to *Morrison* is particularly useful because that case considers the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch.

Before comparing the qui tam provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that *only* the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law.[7] It is clear to us that no such absolute rule exists. *Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him,

[7] To support this proposition, Boeing cites dicta from several cases, including *Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' "), and *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.") We note that the Court in those cases was concerned with congressional encroachment on executive powers, and did not have before it any question (such as that presented here) concerning the role of private parties in an enforcement scheme.

the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch." 487 U.S. at 691 (emphasis added). Use of the word "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not *always* be undertaken by Executive Branch officials. *See* Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Farmers' Intent*, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's assertion that *all* prosecutorial power of any kind belongs to the Executive Branch.

Both sides in this litigation compare the degree of executive control over independent counsels to the degree of executive control over qui tam relators, yet they reach opposite conclusions. Boeing contends that *Morrison* stands at the outer limits of congressional authority to insulate government litigation from presidential control. Even accepting that proposition as true, however, we conclude that the FCA qui tam provisions do not exceed those limits. That is, the FCA permits a degree of executive control sufficient to satisfy the *Morrison* standard.

Each side in this case proposes a different approach to comparing the qui tam provisions to the independent counsel provisions. Boeing suggests that we should look at the precise means of executive control identified and found sufficient in *Morrison*, and then base our decision on the absence of those same means in the qui tam provisions. Kelly, on the other hand, suggests that we iden-

tify all possible means of executive control in the qui tam provisions, and then compare them *in toto* to the means of control identified in *Morrison*. We believe that, under *Morrison*, Kelly's approach is the correct one. Twice in *Morrison* the Court stated that the proper inquiry is whether the Act "taken as a whole" violates the principle of separation of powers by unduly interfering with the President's constitutional role. 487 U.S. at 685, 693. Thus, Morrison instructs us to compare the qui tam provisions "as a whole" to the independent counsel provisions "as a whole".

The powers of an independent counsel are quite broad. "With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.'" *Morrison*, 487 U.S. at 662, citing 28 U.S.C. § 594(a). The counsel's functions and powers include conducting grand jury proceedings and other investigations, initiating and conducting civil and criminal litigation, accepting referrals of matters from the Attorney General, framing and signing indictments, filing informations, appealing decisions, and handling all aspects of any case "in the name of the United States." 487 U.S. at 662. The counsel may also draw on public resources by appointing employees, and requesting and obtaining assistance from the Department of Justice. *Id.* In addition, "whenever a matter has been referred to an independent counsel under the Act, the Attorney General and the Justice Department are required to suspend all investigations and proceedings regarding the matter." *Id.* at 662-63, citing 28 U.S.C. § 597(a).

The powers of a qui tam relator vary depending on whether and when the government takes over the qui tam action. First, when a relator proceeds with a case in which the government has not intervened, the relator

exercises the broadest possible authority the FCA permits. Such a relator has full power to conduct litigation of the particular case in the name of the United States, but only with the resources of a private plaintiff and subject to possible discovery limitations. Also, a relator who pursues a frivolous action can be ordered to pay the defendant's costs and attorneys' fees. On the other hand, when the government takes over a qui tam case from the outset, the FCA explicitly accords the government primary authority to conduct the case. Finally, when the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start.[8] In comparison to any of these three situations, an independent counsel exercises broader investigative authority, prosecutorial discretion, and authority to use the resources of the U.S. government than does a qui tam relator.

Morrison identifies several means by which the Executive Branch can control an independent counsel's exercise of the powers outlined above. First, no independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request an appointment is unreviewable. Second, the Attorney General retains the power to remove an independent counsel, though only upon a showing of

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[8] As mentioned in Part I.B. of this opinion, the parties dispute whether the government exercises the same degree of authority whether it intervenes at the outset or later. The statute is ambiguous on this point, but can, if necessary to preserve the constitutionality of the statute, be read to provide the government the same authority to dismiss or settle the suit regardless of when it intervenes. *See Morrison*, 487 U.S. at 682 (regarding interpretation of a provision not tested in practice, Court noted that "it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities . . . and to that end we think a narrow construction is appropriate here."); *Schor*, 478 U.S. at 841 (courts must construe federal statutes so as "to avoid serious doubt of their constitutionality") (internal quotation omitted).

"good cause." The Act requires the Attorney General to submit a report to the Judiciary Committees of the House and the Senate and to a special court responsible for appointing independent counsels specifying the grounds for removal. *Morrison*, 487 U.S. at 663 (citing 28 U.S.C. § 596(a)(2)). The Attorney General's removal authority is further limited by the Act's provision that an independent counsel can obtain judicial review of the Attorney General's removal action by filing a civil suit. The Act authorizes the reviewing court to grant reinstatement or "other appropriate relief." *Id.* at 663-64 (citing 28 U.S.C. § 596(a)(3)).

Third, the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment. However, it is the special court charged with appointing an independent counsel that actually defines the counsel's prosecutorial jurisdiction. *Id.* at 661 (citing 28 U.S.C. § 593 (b), 679.[9] Finally, the Act requires the counsel to abide by Department of Justice policies, unless it is not possible to do so. *Morrison*, 487 U.S. at 696. The Court concluded that these features give the Executive Branch "*sufficient control* over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* (emphasis added). We note that the Court reached this conclusion despite the fact that the Attorney General's unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.

Under the FCA, the Executive Branch can control a qui tam relator's exercise of prosecutorial powers in several ways. The government can intervene in a case and

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[9] The Court held in *Morrison* that Article III does not prohibit Congress from vesting the Judicial Branch with power to define an independent counsel's jurisdiction as an incident to its power to appoint an independent counsel. *Id.* at 678-79.

then take primary responsibility for prosecuting the action; it can seek judicial limitation of the relators participation; it can move for dismissal of a case which it believes has no merit,[10] after notice to the relator and opportunity for a hearing; it can seek a judicial stay of the relator's discovery regardless of whether it intervenes; and it remains free to seek any alternate remedies available, including through any administrative proceeding. 31 U.S.C. § 3730(c).

Several of the control mechanisms built into the qui tam provisions are qualified. For example, the government may dismiss an action in which it has intervened only after an objecting relator has had an opportunity for a hearing,[11] and may settle with a defendant only after

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[10] At least one district court has interpreted the FCA to permit the government to move for dismissal of a qui tam action without actually intervening in the case. *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992). After four months of investigating Juliano's claims, the government filed a notice that it declined to take over the action as to some defendants, and that it moved to dismiss the others. *Id.* at 349. The court stated that in order to avoid serious constitutional questions which unduly curtailing the Attorney General's prosecutorial discretion would raise, it would interpret the Act's provision that the "Government may dismiss the action notwithstanding the objections" of the relator to apply to actions in which the government has not already intervened. *Id.* at 351. As the court aptly pointed out, the Act nowhere prohibits such an interpretation. *See id.* Though the specific question addressed in *Juliano* is not directly before us, we believe that the court's interpretation of the FCA is entirely appropriate and provides an illustration of the meaningful control which the Executive Branch can exercise over qui tam actions.

[11] It is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government. However, we note that Congress apparently intended that the provision authorizing relators to formally object to any motions to dismiss or proposed settlements between the government and defendant should not pose a significant burden for the government

a court has determined that the proposed settlement is "fair, adequate, and reasonable under all the circumstances." [12] 31 U.S.C. § 3730(c)(2)(A), (B). Furthermore, the government must show "good cause" in order to intervene in an action which has already commenced. *Id.* § 3730(c)(3). However, the only unqualified control built into the independent counsel provisions is that the Attorney General has unreviewable discretion to request appointment of a counsel, and therefore to initiate litigation by a counsel. Boeing argues that the power to initiate litigation is an important and exclusively executive

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or courts. The Senate Judiciary Committee Report on the version ultimately passed of the 1986 amendments to the FCA stated:

> Any objections filed by the *qui tam* plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the *qui tam* relator shows a "substantial and particularized need" for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations.

Senate Judiciary Committee, False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

[12] Significant precedent exists for the requirement that a court approve the government's decision to terminate a case brought on behalf of the United States. For example, Federal Rule of Criminal Procedure 48(a) requires the government to obtain leave of court to terminate a prosecution by dismissing an indictment, information or complaint. In addition, the government may settle a criminal case by plea bargain only with court approval. And finally, a court may enter a consent judgment proposed by the government in an antitrust action only if it is in the public interest. *See United States, ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 622 (C.D. Cal. 1989); *United States, ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).

function.[13] Clearly, the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a qui tam relator. But once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately *end* the litigation in a qui tam action than it does in an independent counsel's action.[14] We conclude that because the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it can not prevent its start.

The Court in *Morrison* noted that even though the mechanisms just discussed give the Executive Branch sufficient control over an independent counsel, it "is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." *Morrison,* 487 U.S. at 695. The Court specifically pointed out that the Act does not allow the Attorney General to appoint the individual of his or her choice, to determine the counsel's jurisdiction, or to remove a counsel at will. *Id.* at 695-96. Likewise, we do not deny that the qui tam provisions of the FCA to some degree diminish

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[13] Boeing supports this proposition by citing to dicta in two cases, i.e., *Heckler v. Chaney,* 470 U.S. 821, 832 (1985) ("the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."), and *United States v. Nixon,* 418 U.S. 683, 693 (1974) (Court noted the argument of President's counsel that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). We do not believe these comments amount to an absolute rule that only executive officers may initiate any type of litigation in the name of the United States.

[14] The Attorney General can do no more than suggest to a court that it terminate the office of an independent counsel. *Morrison,* 487 U.S. at 664. By comparison, the government "may dismiss" a qui tam action "notwithstanding the objections" of the relator, as long as the relator has received notice and an opportunity for a hearing. 31 U.S.C. § 3730(c)(2)(A).

Executive Branch control over the initiation and prosecution of a defined class of civil litigation. Nonetheless, we find that the Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels.[15] Thus, the FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns.

In addition to considering whether the Ethics in Government Act taken as a whole violates the separation of powers principle, the Court in *Morrison* also specifically addressed whether the provision of the Act restricting the Attorney General's power to remove an independent counsel, taken by itself, impermissibly interferes with the President's exercise of his functions. 487 U.S. at 685. The Court held in *Morrison* that the "good cause" restriction on the Attorney General's power to remove an independent counsel does not violate separation of powers. *Id.* at 693. The essence of the Court's removal analysis in *Morrison*, based on its interpretation of prior removal jurisprudence, is an inquiry into whether Congress has impermissibly encroached on executive power by limiting presidential removal authority. *Id.* at 685-93. *See also Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."). The Court found no such encroachment evident in the independent counsel provisions. *Morrison*, 487 U.S. at 691.

In light of the attention paid to the removal issue in *Morrison*, we have considered whether the lack of a provision permitting the government to "remove" a relator invalidates the qui tam provisions. Short of dismissing a

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[15] The "jurisdiction" of a relator seems necessarily limited by the terms of the False Claims Act and the facts of the particular case; thus the fact that the Attorney General plays a role in defining an independent counsel's jurisdiction but not a relator's does not set the two Acts apart.

qui tam action, the government can only seek *limitation* of a relator's participation in a case. 31 U.S.C. § 3730 (c)(2)(C). However, the concept of removal does not make sense in the qui tam context, in which there is no "office" from which to remove the relator and subsequently fill with someone else. *Cf. Morrison*, 487 U.S. at 664 (discussing procedures for terminating the "office" of an independent counsel). In contrast to independent counsels, relators are not replaceable. *Cf. id.* at 662 n. 5 (special court which appoints independent counsels authorized under 28 U.S.C. § 593(e) to fill vacancies due to death, resignation or removal of an independent counsel). The only practicable way to "remove" a relator is to end the qui tam litigation—and this the government has power to do. While the government's power to end qui tam litigation is qualified, so is the government's power to remove an independent counsel; [16] thus, these aspects of the two Acts are not meaningfully distinguishable for purposes of separation of powers analysis.

4. Judicial Encroachment.

We have discussed in the preceding the central separation of powers issue presented to us in this appeal—that is, whether Congress has impermissibly undermined the role of the Executive Branch by permitting private parties to exercise some measure of prosecutorial authority. We must also resolve a distinct, but in this case less

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[16] In holding that Congress's imposition of a "good cause" standard for removal does not unduly trammel on executive authority, the Court stated:

> Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Morrison, 487 U.S. at 691-92.

difficult, separation of powers problem: whether the qui tam provisions disrupt the proper balance of power between the three branches by permitting the Judicial Branch to encroach on executive authority. We recognize the general rule that under Article III, courts may not exercise "executive or administrative duties of a non-judicial nature." *Buckley*, 424 U.S. at 123. The purpose of this rule is "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison*, 487 U.S. at 680-81.

Boeing argues that the FCA gives federal courts too much control over whether the government may intervene later in a qui tam action which it initially declined to take over, because the Act requires the government to demonstrate "good cause" to do so. Boeing asserts that the "good cause" hurdle significantly interferes with the government's prosecutorial authority. Boeing attempts to support that assertion by noting that the court denied the government's intervention request in one out of only two cases of which it is aware in which the government has sought late intervention.[17] Boeing further argues that the FCA impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits.

We conclude that the judicial involvement which the FCA authorizes does not contravene the separation of powers principle. First, in the absence of any meaningful indication that these requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such and thereby heighten constitutional concerns. *See*

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[17] Unfortunately, Boeing did not provide us with a name or citation for that one case; thus, we are unable to verify whether the court did in fact deny the government's request for intervention or to consider the court's reasoning.

note 8. Second, as we noted earlier, ample precedent exists for judicial oversight of the government's decision to dismiss a qui tam action. *See* note 12.

Furthermore, the extent of judicial involvement in the qui tam scheme is no greater than the extent of judicial involvement in implementation of the independent counsel provisions of the Ethics in Government Act. The Court in *Morrison* held that the Constitution permits Congress to vest power in a special federal court to decide whom to appoint to the office of independent counsel, as well as to define a counsel's jurisdiction and perform a variety of other functions which, though "essentially ministerial," do require the exercise of some judgment and discretion. *Morrison,* 487 U.S. at 676-81. The Court also held that the special court's power to terminate the office of independent counsel is not a significant judicial encroachment on executive authority, even though it is not a typically judicial power and "has few analogues among the court's more traditional powers." *Id.* at 682. The Court explicitly construed the termination provision narrowly "in order to save it from constitutional infirmities," though it acknowledged that "an adventurous special court" conceivably could use its termination power aggressively. *Id.*

In light of *Morrison,* we believe it is not dispositive that no direct analogue exists for judicial authority to determine whether the government has demonstrated good cause to take over a case prosecuted in the name of United States.[18] This power may affect the government's prosecutorial discretion to some degree, but it does not amount to the power to supervise the prosecutorial conduct of either the Attorney General or a relator. *Cf.*

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[18] Federal courts do, however, routinely make evaluations which are similar to the intervention determination under the FCA. *See* Federal Rule of Civil Procedure 24(b) (permissive intervention). Of course, Rule 24(b) determinations do not raise the Article III concerns we address here.

Morrison, 487 U.S. at 681 ("The Act simply does not give the [special court] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") By comparison, we note that *Morrison* approved a scheme in which the Attorney General relinquishes *all* unqualified prosecutorial discretion with respect to a matter referred to an independent counsel once he or she has decided to request appointment of a counsel. Moreover, *Morrison* specifically held that the provision that the Attorney General must show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by permitting excessive judicial involvement. *Id.* at 691.

Considering the matter with a practical eye, *cf. Schor*, 478 U.S. at 851 ("[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."), we conclude that the FCA does not authorize the judiciary to infringe on prosecutorial authority to a degree beyond the bounds established in *Morrison*. The government's authority to intervene at the outset of an action is unfettered; we have seen no indication that it is difficult for the government to show good cause to intervene late; and, in view of analogous authority, judicial oversight of the government's dismissal power is unremarkable.

5. Conclusion.

Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels. Therefore, we conclude that the qui tam provisions of the FCA do not "impermissibly inter-

fere" with the President's exercise of his constitutionally assigned duties. Nor do the provisions disrupt the "proper balance" between the branches, because, like the Ethics in Government Act, the FCA permits the Executive Branch to retain "sufficient control" over prosecutorial functions.[19] Finally, the provisions do not authorize constitutionally impermissible judicial encroachment on executive power.

C. *Appointments Clause.*

The third constitutional question we consider is whether the qui tam provisions of the FCA violate the Appointments Clause.[20] This case does not present the usual situation raising an Appointments Clause problem —that is, where the power to appoint is placed in the hands of the wrong branch or governmental entity. In other words, this case does not present a question of improper diffusion or arrogation of appointment power. Rather, it requires us to inquire whether completely *unappointed* qui tam relators wield so much governmental power that they *must* be appointed in conformity with the Appointments Clause.

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[19] Boeing raises the specter of Congress enacting an unlimited series of qui tam provisions if this court finds the qui tam provisions in the FCA to be constitutional. However, this pure speculation about the policy choices Congress might attempt to make does not weigh into our constitutional analysis. Furthermore, it is unlikely that in other areas of civil law enforcement a similarly concrete, identifiable injury to the U.S. treasury as exists in the FCA context would exist as a basis for standing.

[20] Art. II, § 2, cl. 2 of the U.S. Constitution provides: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The purpose of the Appointments Clause is to limit congressional discretion to disperse the power *to appoint*, and thereby preserve the Constitution's structural integrity. *Freytag*, 111 S. Ct. at 2638-39, 2641-42. Under *Buckley*, persons who are not appointed by a body with proper appointment authority, and who therefore can not be considered "Officers of the United States," may not discharge functions that are properly discharged only by "officers". 424 U.S. at 140. The test which *Buckley* provides to assess whether persons exercise authority which can only properly belong to appointed "officers" is whether those persons "exercis[e] significant authority pursuant to the laws of the United States." *Id.* at 126. The Court held in *Buckley* that statutory provisions vesting in the Federal Election Commission "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violate the Appointments Clause because only officers may perform such functions. *Id.* at 140.

The appropriate questions in this case, therefore, are whether qui tam relators exercise "significant authority" under the FCA, and whether the FCA vests in relators "primary responsibility" for enforcing the Act by litigating in the federal courts. Our answers to these questions follow logically from our determination, explained in Section III.B., that the qui tam provisions do not violate the separation of powers principle. We have concluded that the Executive Branch retains "sufficient control" of relators such that their exercise of authority to sue on behalf of the United States does not "impermissibly undermine" executive functions. In keeping with that conclusion, we find it impossible to characterize the authority exercised by relators as so "significant" that it must only be exercised by officers appointed in the manner which Article II, § 2, cl. 2 prescribes. *See Buckley*, 424 U.S. at 126. Linking our Appointments Clause and separation of powers analyses in this manner is appropriate in light of the fact that the Supreme Court has

interpreted the Appointments Clause to serve the purpose of maintaining the separation of powers in the constitutional scheme. *Freytag*, 111 S. Ct. at 2638, 2641 ("The principle of separation of powers is embedded in the Appointments Clause."); *See Buckley*, 424 U.S. at 120, 124.

Boeing and amici supporting its position argue, citing *Buckley*, that only officers of the United States may litigate on behalf of the government. We do not believe *Buckley* can fairly be read to state an unequivocal rule that only officers may exercise any prosecutorial authority in the name of the United States. Instead, *Buckley*, properly construed, directs only that persons who have "primary responsibility" and "significant authority" to enforce a law through litigation must be considered officers. *Buckley*, 424 U.S. at 126, 140.

As Kelly correctly points out, the qui tam provisions do not contravene *Buckley*'s rule. The fact that relators sue in the name of the government does not vest them with any governmental powers; they conduct litigation under the FCA with only the resources of private plaintiffs. Furthermore, relators have no greater authority to enforce the FCA than does the Attorney General, and under the terms of the statute must yield to the government's assumption of "primary responsibility" when it elects to intervene in a qui tam action. 31 U.S.C. § 3730 (c)(1). When the government does not intervene, a relator retains primary responsibility for the litigation, thus presenting what may seem a close question under *Buckley*; but even in that situation, the relator's responsibility only extends to a single case, and the relator's activities can still be limited by the court upon the request of either the government or the defendant.[21] Thus, the

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[21] In addition, as the district court below pointed out, a relator "is not appointed by Congress, receives no federal salary, and serves for no specified term." Order denying dismissal at 7. These factors distinguish relators from "officers". *See Auffmordt v.*

qui tam scheme does not threaten the interest in preventing the exercise of unchecked or unbalanced government power which underlies the Appointments Clause. Moreover, the Court's central point in *Buckley* was that Congress may not arrogate power to itself by appointing officers who perform executive functions. The Court held that the Federal Election Commission could not exercise the powers conferred upon it precisely because Congress exceeded its authority by vesting itself with power to appoint the commissioners. *Buckley*, 424 U.S. at 143. Such concerns about congressional aggrandizement simply are not implicated in this case.

We conclude that a qui tam relator, who litigates only a single case, does not have "primary responsibility" within the meaning of *Buckley* for enforcing the FCA. Nor does a relator exercise authority so "significant" that the Constitution only permits an officer of the United States to exercise it. Therefore, the qui tam provisions do not violate the Appointments Clause.

D. *Due Process.*

The final question before us is whether the qui tam provisions of the FCA violate the Due Process Clause of the Fifth Amendment. Boeing argues that the FCA violates Boeing's right not to be deprived of property without due process[22] because it permits financially interested relators to prosecute the company on behalf of the government. Boeing contends that the Act's promise of a reward to relators for successful prosecution creates a conflict of interest between a relator's desire for pecuniary gain and duty as a prosecutor performing "govern-

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Hedden, 137 U.S. 310, 327 (1890) (person is not an "officer" within meaning of Appointments Clause where his "position is without tenure, duration, continuing emolument, or continuous duties").

[22] The Fifth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

ment functions" to seek a just and fair result. Because the government is the real party in interest, Boeing asserts, a relator must "place justice above competing objectives." Brief of Appellant at 10.

Boeing does not cite persuasive authority for its position. In one case on which Boeing relies, *Marshall v. Jerrico*, 446 U.S. 238 (1980), the Supreme Court did state that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. However, the Court found *no* due process violation in the case before it, in which the Court determined that prosecutors enforcing the child labor provisions of the Fair Labor Standards Act had only an exceptionally remote financial incentive for securing civil penalties. *Id.* at 250. Thus, the Court explicitly declined to state the "limits there may be on a financial or personal interest of one who performs a prosecutorial function." *Id.* In addition, the Court noted that "[p]rosecutors need not be entirely 'neutral and detached' . . . . In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests . . . are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." *Id.* at 248-49. Boeing's contention that the *Marshall* Court "strongly suggested" that the Due Process Clause prohibits civil prosecutions by financially interested prosecutors is exaggerated, and does not support a finding of a due process violation here.

Also, Boeing's reliance on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), is misplaced. The Court held in *Young* that courts generally may appoint private attorneys to prosecute criminal contempt charges, but that the district court in the particular case before it erred in appointing attorneys who were counsel for an interested party in the underlying litiga-

tion. *Id.* at 793, 802. However, only Justice Blackmun in a concurring opinion stated that the error amounted to a due process violation. *Id.* at 815 (Blackmun, concurring). *Young*, in addition, is distinguishable from the present case in that it involved *criminal* prosecution, and therefore arguably required a higher level of prosecutorial disinterest than would be necessary in a civil enforcement action under the FCA. *See id.* at 808 (noting criminal nature of litigation in question).

Furthermore, the type of conflict of interest at issue in *Young* is simply not extent in the qui tam situation, where private and public goals are congruent. In *Young*, the Court observed that a private attorney appointed to prosecute a criminal contempt action "is appointed solely to pursue the public interest in vindication of the court's authority . . . [and] therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. But in the FCA context, Congress has created a scheme in which the interests of the private prosecutor (that is, the relator) coincide with the public interest in remedying harm to the federal treasury. Under the explicit terms of the Act, a qui tam action is taken on behalf of *both* the government and the relator, indicating that the two share a single interest in successful litigation. *See* 31 U.S.C. § 3730(b). Indeed, the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting.

Moreover, contrary to Boeing's suggestion, it is not at all clear that qui tam relators are bound to fulfill the same type of public duty as government prosecutors. The statutory terms of the FCA do not impose such a duty, nor do relators owe a duty by virtue of holding a public "office". Furthermore, the fact that relators sue in the name of the United States does not mean that they wield governmental powers and therefore owe the same type of

duty to serve the public interest as government prosecutors. First, the fact that relators sue in the name of the government is significant only with respect to their standing to sue; based on the terms of the statute, in no way does this fact otherwise affect the conduct of qui tam litigation. Second, unlike public prosecutors, relators do not have the "power to employ the full machinery of the state in scrutinizing any given individual." *Young*, 481 U.S. at 814; *see id.* at 811 ("terrible array of coercive methods" is available to prosecutors, including police investigation and interrogation, warrants, immunized informers and agents, authorized wiretapping, civil investigatory demands, and enhanced subpoena power.) Qui tam relators pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action. Thus, qui tam litigation does not implicate due process concerns.

IV. CONCLUSION

We conclude that the qui tam provisions of the False Claims Act do not conflict with Article III of the Constitution, nor violate the principle of separation of powers, the Appointments Clause, or the Due Process Clause.[23] Accordingly, we affirm the district court's denial of Boeing's motion to dismiss.

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[23] The parties and amici devote considerable attention to arguments concerning the historical pedigree of qui tam actions. The two sides in this case present conflicting portraits of that pedigree. Obviously, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). But historical factors can affect a court's decision where there is significant evidence of an "unambiguous and unbroken history" of practice dating from the framing of the Constitution. *Id.* at 790-92. The evidence presented by those urging affirmance in this case does not appear to rise to that level. In any event, because we find no constitutional violations here, we need not consider the historical arguments at all.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-36660

UNITED STATES OF AMERICA, *ex rel.*
KEVIN G. KELLY,
Plaintiff-Appellee,

v.

THE BOEING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington

Argued and Submitted April 7, 1993
Decided Sept. 7, 1993

Before: HALL, WIGGINS and LEAVY, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

This appeal presents several constitutional challenges to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729 et seq. The question of the constitutionality of the qui tam provisions is one of first impression in this circuit. We hold that these provisions do not

exceed the limitations of Article III of the Constitution, nor do they violate the constitutional principle of separation of powers, the Appointments Clause of Article II, or the Due Process Clause of the Fifth Amendment.

I. OVERVIEW AND BACKGROUND

The Boeing Company ("Boeing") appeals the district court's denial of its motion to dismiss a qui tam action under the False Claims Act ("FCA" or "the Act"). Qui tam plaintiff Kevin G. Kelly filed the action against Boeing on behalf of the United States to recover damages and penalties for allegedly fraudulent charges to the United States. Boeing claimed in its motion to dismiss that the district court lacked jurisdiction over Kelly's suit because the provisions of the FCA which authorize qui tam actions are unconstitutional.

The district court rejected Boeing's four constitutional challenges to the FCA, but certified an interlocutory appeal of its rulings on the constitutional issues. We granted permission to appeal pursuant to 28 U.S.C. § 1292(b). We have considered and likewise rejected Boeing's arguments. Therefore, we affirm.

A. Facts and Proceedings Below.

In November 1989, Kelly, a former Boeing employee, filed a complaint under seal alleging that Boeing committed various violations of the False Claims Act related to its work as a subcontractor on the government's B-2 Bomber and Advanced Tactical Fighter programs. Kelly claimed that Boeing improperly charged to the government certain facilities lease costs. Kelly served his complaint on the government, as required under the Act, after which the government investigated his allegations for over three years. Upon completing its investigation, the government elected not to intervene in the case. The district court then unsealed the case, and Kelly served on Boeing an amended complaint. Boeing then moved to dismiss, raising the four constitutional challenges that it pursues

in this appeal. The district court denied Boeing's motion,[1] and certified the constitutional issues for immediate appeal to this court.

B. The Qui Tam Provisions of the FCA.

The FCA, which Congress originally enacted in 1863, is the government's "primary litigative tool for combatting fraud" against the federal government. Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. 31 U.S.C. § 3730 (1988). Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act and thereby to enlist the aid of the citizenry in combatting the rising problem of "sophisticated and widespread fraud." [2] S.Rep. No. 345 at 2, 23-24, reprinted in 1986 U.S.C.C.A.N. at 5267, 5288-89.

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). An action under this provision is

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[1] The district court granted Boeing's motion to dismiss a state law wrongful discharge claim included in Kelly's amended complaint. Kelly does not contest that ruling.

[2] The legislative history indicates that Congress sought to encourage more private enforcement of the FCA because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of the Government fraud, there appears to be a great unwillingness to expose illegalities." S.Rep. No. 345 at 4, reprinted in 1986 U.S.C.C.A.N. at 5269.

termed a "qui tam" [3] suit, and the person who brings such an action is referred to as a "relator" or "informer." If the government files an action to enforce the FCA, a would-be relator may not later bring any action based on the same underlying facts. 31 U.S.C. § 3730(e)(3). Nor may a private party litigate a qui tam suit based on the public findings of a government investigation or on disclosures in the news media, unless that party is an original and independent source of the information on which the complaint is based. Id. § 3730(e)(4)(A)-(B).

Upon bringing a qui tam action, a relator must serve on the government a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses. The complaint must be filed in camera and remain under seal for at least 60 days so that the government may investigate the relator's allegations, though upon a showing of "good cause" the government may move the court for extensions of the 60 day period. Id. § 3730(b)(2), (3). By the end of the period provided for the government's investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the Government," id. § 3730(b)(4)(A), or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." Id. § 3730(b)(4)(B).

The Act explicitly provides that if the government takes over the qui tam action from the start, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." Id. § 3730(c)(1). Though the relator "shall

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[3] The term "qui tam" is short for "qui tam pro domino rege quam pro se imposo sequitur," which is interpreted as "who brings the action as well for the king as for himself." Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc., 324 F.Supp. 302, 305 (S.D.Tex.1971).

have the right to continue as a party," id., the government may end the litigation or limit the participation of the relator in several ways. First, the government may dismiss the action "notwithstanding the objections of the person initiating the action" once the relator has received notice and an opportunity for a hearing on the dismissal motion. Id. § 3730(c)(2)(A). Second, the government may settle with the defendant "notwithstanding the objections of the person initiating the action," but only if the court determines after a hearing "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." Id. § 3730(c)(2)(B). Third, the government may request that the court impose appropriate limitations on the relator's participation if it shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." Id. § 3730(c)(2)(C). The Act also provides the defendant an opportunity to request that the court limit the relator's participation, upon a showing that unrestricted participation "would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense." Id. § 3730(c)(2)(D).

When the government chooses not to take over a qui tam action, the relator "shall have the right to conduct the action." Id. § 3730(c)(3). Upon the government's request, however, the relator must serve the government with copies of all pleadings and deposition transcripts. Whether or not the government takes over the action from the outset, it may ask the court to stay the relator's discovery for an extendable 60-day period, upon a showing that the relator's discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." Id. § 3730(c)(4).

In cases where the government initially elects not to take over the action, the court "may nevertheless permit

the Government to intervene at a later date upon a showing of good cause." Id. § 3730(c)(3). In permitting late intervention, the court may not limit "the status and rights" of the relator. Id. The parties and amici in this appeal raise two questions concerning this particular aspect of the qui tam provisions. First, they dispute the height of the "good cause" hurdle. Second, they dispute the meaning of the proviso that the court may not limit the relator's "status and rights." Boeing claims that this proviso means the relator retains primary authority to conduct the action, whereas Kelly claims that this simply means the relator retains the right to participate as a party to the litigation.[4] Both questions relate to the broader issue, addressed in the discussion section of this opinion, concerning the extent of the government's ability to exert control over a qui tam suit.

The Act provides for a range of possible awards to successful qui tam plaintiffs. In actions which the government has taken over, the relator receives between 15 and 25 percent of the proceeds of the action or settlement of the claim. But if the court finds that the action is based primarily on information of which the relator is not the original source, the relator's award must be limited to no more than 10 percent of the proceeds or settlement. In actions in which the government has not intervened, the relator receives between 25 and 30 percent of the proceeds or settlement. In any of the above situations, the relator also receives an amount for reasonable expenses, attorneys' fees and costs, awarded against the defendant rather than taken out of the proceeds or settlement. Id. § 3730(d)(1), (2). On the other hand, an unsuccessful relator in a case in which the government has not intervened may be ordered to pay the defendant

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[4] Kelly argues that § 3730(c)(3) "simply secures the party status and percentage award to which the relator would have been entitled had he continued to litigate the case without government intervention."

its reasonable attorneys' fees and expenses if the court finds that the relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Id. § 3730(d)(4).

II. STANDARD OF REVIEW

We review de novo the purely legal question whether a statute is constitutional. Gray v. First Winthrop Corp., 989 F.2d 1564, 1567 (9th Cir.1993). We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." Mistretta v. United States, 488 U.S. 361, 384, 109 S.Ct. 647, 661, 102 L.Ed.2d 714 (1989) (quoting Bowsher v. Synar, 478 U.S. 714, 736, 106 S.Ct. 3181, 3193, 92 L.Ed.2d 583 (1986) (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. Communications Workers of America v. Beck, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988). Our adherence to this principle of presumptive constitutionality is guided by our understanding that "[w]hen we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.' " Fullilove v. Klutznick, 448 U.S. 448, 472, 100 S.Ct. 2758, 2771, 65 L.Ed.2d 902 (1980) (citation omitted).

III. DISCUSSION

A. Standing

1. Article III Requirements

We first address the threshold question of justiciability —whether a qui tam plaintiff has standing to sue under the FCA. Article III, section 2 of the Constitution limits the judicial power of the United States to the resolution of cases and controversies. The doctrine of standing is

used to determine whether a conflict qualifies as a case or controversy and is therefore capable of judicial resolution. Lujan v. Defenders of Wildlife, —— U.S. ——, ——, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Standing, in turn, is dependent on three conditions. First, the plaintiff must have suffered an "injury in fact." This consists of an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent. Second, there must be a causal connection between the injury and the conduct serving as the basis of the lawsuit. In other words, the injury has to be traceable to the challenged action of the defendant and not the result of the conduct of a third party not before the court. Third, it must be likely that the injury will be redressed by a favorable decision. Id.

Boeing and amici curiae argue that the only injuries implicated in qui tam suits are injuries to the federal treasury resulting from false claims against the United States. Qui tam relators do not suffer harm, and are therefore unable to establish the constitutional elements of standing. It follows that by granting standing to private parties, the FCA's qui tam provisions run afoul of Article III and are unconstitutional.

We disagree. As an initial matter, we think it is possible for a qui tam plaintiff to suffer sufficient harm to satisfy the injury in fact requirement of Article III. In many cases, qui tam plaintiffs will be unwilling participants in the alleged fraud. Under these circumstances, they are denied the benefit of working for an honest business. As the court in United States ex rel. Robinson v. Northrop Corp., 824 F.Supp. 830 (N.D.Ill.1993), explained, this is not an insignificant injury. The embarrassment and discomfort of working for a company that has allegedly perpetrated a fraud on the government can be quite substantial. Id. at 835.

In addition, qui tam plaintiffs are faced with the difficult choice of either remaining silent and being subject to

potential liability or reporting the fraud to a superior and suffering repercussions as severe as dismissal. We recognize that the potential harm flowing from this choice is too speculative to qualify as injury in fact.[5] However, we are convinced that the decision making process that an individual exposed to fraud is forced to engage in causes significant present harm. The stress, anxiety, and mental anguish caused by this dilemma satisfies the injury in fact requirement. The Supreme Court has long recognized that noneconomic and intangible injuries fulfill the injury in fact requirement. Sierra Club v. Morton, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). Indeed, the Court has gone so far as to state that an "identifiable trifle" is enough to establish standing. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973). "Accordingly, a showing of slight, non-economic injury is sufficient to confer standing." Murphy v. Bilbray, 782 F.Supp. 1420, 1425 n. 16 (S.D.Cal.1991), aff'd, Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir.1993). We hold that the injuries suffered by a qui tam plaintiff satisfy this standard.

Our conclusion is not undermined by the Supreme Court's statement in Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc., 454 U.S. 464, 485, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982), that the psychological consequence of observing conduct with which one disagrees is not an injury sufficient to confer standing under Article III. See also Asarco v. Kadish, 490 U.S. 605, 616, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989). The Supreme

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[5] See United States ex rel. Truong v. Northrop Corp., 728 F.Supp. 615, 619 n. 5 (C.D.Cal.1989), in which the district court held that the threat of prosecution and the chance of being fired, demoted or blackballed, do not constitute "actual" or "threatened" injury, but instead are more appropriately classified as "speculative" harm, which is insufficient to establish injury in fact.

Court's observation in Valley Forge does not foreclose the possibility of basing standing on psychological or mental harm. See e.g. Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396-97 (9th Cir.1992) (members of an environmental group had standing to sue based on psychological injury suffered from viewing the killing of buffalo in Montana). Instead, the Court's language is properly understood to mean that the simple indignation or ideological objection caused by viewing certain conduct does not establish the injury in fact necessary for standing.[6] Cf. Harris v. City of Zion, Lake County, Ill., 927 F.2d 1401, 1405 (7th Cir.1991).

The harm a qui tam plaintiff suffers is far more severe than the harm at issue in Valley Forge. Fraud is illegal and reasonable people do not respond differently when exposed to such conduct. The shock, outrage and embarrasment experienced can be quite serious. Moreover, exposure to fraud is not a matter of simple indignation. The difficult choice a qui tam plaintiff faces when he becomes an unwilling participant in fraudulent activity directly affects his freedom of action. See Harris, 927 F.2d at 1405. Thus, the limitation articulated in Valley Forge is inapplicable here.

Nor is it significant that the alleged fraud harms a qui tam plaintiff less severely than the federal government. In Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), the Supreme Court recognized that individuals who are not the primary victims of the illegal conduct at issue still have standing to sue. Id. at 210, 93 S.Ct. at 367. Trafficante involved

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[6] Other courts have limited the reach of Valley Forge. See. e.g., *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir.1989); Saladin v. City of Milledgeville, 812 F.2d 687 (11th Cir.1987); Hawley v. City of Cleveland, 773 F.2d 736 (6th Cir.1985) (holding that the psychological injury caused by direct, personal contact with religious displays or markings on public property was sufficient to establish standing).

the intentional exclusion of African-Americans from an apartment complex. Two members of the complex, one African-American and one Caucasian, brought suit against the owner of the complex pursuant to § 810 of the Civil Rights Act of 1968. The Supreme Court held that while the individuals who were excluded from the complex were "damaged the most," the plaintiffs had standing to sue. Id. They suffered injury in fact because they were denied the benefit of living in an integrated community and because they experienced the embarrassment of residing in a segregated building. Id. at 208, 93 S.Ct. at 366. Similarly, qui tam relators suffer injury in fact because they are denied the benefit of working for an honest business and experience the embarrassment of working for a company that allegedly perpetrated fraud on the government. See Robinson, 824 F.Supp. at 835.

In addition to suffering injury in fact, we conclude that it is possible for qui tam relators to satisfy the constitutional requirements of causation and redressability. The alleged fraud which is the subject of a qui tam suit is the 'but for' cause of the embarrassment and mental anguish a qui tam relator suffers. Furthermore, the relief requested is likely to remedy this harm in two ways. First, a verdict in the relator's favor distances him from the fraud and provides him with the moral satisfaction of knowing that he helped combat the unlawful activity. Second, the bounty compensates the relator for the harm he suffered and helps make him whole.

Thus, we hold that a qui tam relator can fulfill the three elements necessary for standing under Article III. Our inquiry does not end here, however. In addition to the constitutional requirements of standing, the courts have established certain self-imposed or prudential limitations on the exercise of their jurisdiction. First, the Supreme Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). Second, the Court has refrained from adjudicating "generalized grievances" shared by all or a large class of citizens. Id. at 499-500, 95 S.Ct. at 2205-2206. Lastly, the Court has required that a plaintiff's complaint fall within the zone of interests protected or regulated by the statute or constitutional guarantee in question. Valley Forge, 454 U.S. at 475, 102 S.Ct. at ——.

It is possible to argue that one or more of these prudential limitations precludes conferring standing on qui tam plaintiffs. The Supreme Court has made clear, however, that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." Warth, 422 U.S. at 501, 95 S.Ct. at 2206. We believe that this was Congress's intent in enacting the qui tam provisions of the FCA. It follows that the judiciary's prudential hurdles are inapplicable, and that a qui tam plaintiff can seek relief on the basis of the legal rights and interests of others and may invoke the general public interest in support of his claim. Id.

2. Assignment

In the instant case, Kelly does not contend that he suffered embarrassment and mental anguish as a result of being exposed to Boeing's alleged fraudulent conduct. We do not think that this precludes him from bringing suit, however. Instead, we hold that an alternative ground for standing exists in qui tam suits. That is, the FCA effectively assigns the government's claims to qui tam plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury.

Under this alternative theory of standing, the FCA's qui tam provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit. If the government declines to prosecute the alleged wrongdoer, the qui tam

plaintiff effectively stands in the shoes of the government. Because the government clearly is capable of establishing injury-in-fact, causation, and redressability, qui tam plaintiffs satisfy these Article III requirements as well.

Several courts and commentators have embraced this assignment theory. See United States ex rel. Kreindler & Kreindler v. United Technologies Corporation, 985 F.2d 1148 (2d Cir.), cert denied, —— U.S. ——, 113 S.Ct. 2962, 125 L.Ed.2d 663 (1993); United States Dept. of Housing and Urban Develop. ex rel. Givler v. Smith, 775 F.Supp. 172, 180-81 (E.D.Pa.1991); Truong v. Northrop Corporation, 728 F.Supp. 615, 618-620 (C.D.Cal.1989); Thomas R. Lee, Comment, The Standing of Qui Tam Relators Under the False Claims Act, 57 U.Chi.L.Rev. 543, 563-70 (1990). Moreover, this theory comports with federal practice. Federal courts routinely find that fraud claims are assignable. See Amerifirst Bank v. Bomar, 757 F.Supp. 1365, 1370-71 (S.D.Fla.1991) (10b-5 claims assignable); Federal Deposit Ins. Corp. v. Main Hurdman, 655 F.Supp. 259, 266-68 (E.D.Cal.1987) (bank's actions for fraud and malpractice assignable to FDIC); In re National Mortg. Equity Corp., 636 F.Supp. 1138, 1152-56 (C.D.Cal.1986) (RICO treble damage claims assignable). In addition, federal courts consistently recognize that an assignee of a fraud claim can assert his claim despite being unable to satisfy traditional standing requirements. Amerifirst Bank, 757 F.Supp. at 1370; Main Hurdman, 655 F.Supp. at 267. See also National Ass'n of Realtors v. Nat. Real Est. Ass'n., 894 F.2d 937, 941 (7th Cir. 1990).

Boeing and amici curiae argue that it strains reason to suggest that Congress was attempting to make a legal assignment through the FCA. They emphasize that the word "assignment" does not appear in the statute, and that no other language suggests that Congress was attempting to bestow a contractual right on the plaintiffs.

We disagree. It is well established that terms of art are not required for a valid assignment. "[T]he assignor need not even use the word 'assign'." Allan E. Farnsworth, Contracts § 11.3, at 786 (2d ed. 1990). Instead, the parties' intent controls. Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1283 (9th Cir.), cert. denied, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983). We conclude that Congress intended to assign the government's fraud claims to individual qui tam plaintiffs in cases where the government itself chooses not to pursue such claims. The express language of the FCA gives relators the right to bring suit on behalf of the government. Moreover, the entire purpose of the FCA's qui tam provisions is to employ the help of individuals to uncover fraud against the government.

We are unconcerned that the assignment of the government's claim is contingent on a qui tam plaintiff filing suit, that the qui tam plaintiff is only assigned part of the government's claim, and that the government retains the right to intervene. Assignments can be made conditional on the occurrence of a future event. Farnsworth, § 11.3, at 789. In addition, the fact that the relator is only entitled to a maximum of thirty percent of the total recovery of a qui tam suit is insignificant. This court has observed that "[a]n assignment of claims does not prevent the assignors from receiving the benefits of the litigation." Klamath-Lake Pharm., 701 F.2d at 1282. Finally, the government's retention of the right to intervene in a relator's action upon a showing of good cause is completely consistent with the rule that an assignment may be limited in its effect. Farnsworth, § 11.3, at 789.

3. Policy Concerns.

Thus, we hold that the FCA's qui tam provisions do not run afoul of Article III. Consideration of the policy concerns underlying the standing doctrine supports this conclusion. In Allen v. Wright, 468 U.S. 737, 752, 104 S.Ct.

3315, 3325, 82 L.Ed.2d 556 (1984), the Supreme Court explained that "the law of Art. III standing is built on a single basic idea—the idea of separation powers." Standing ensures that federal courts maintain their properly limited role in a democratic society by requiring that cases are presented in an adversarial context and in a form historically viewed as capable of judicial resolution. Flast v. Cohen, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968).

Qui tam suits are presented in the traditional adversarial context. They involve concrete factual disputes which prevent the federal courts from being converted into "judicial versions of college debating forums" issuing abstract opinions. Valley Forge, 454 U.S. at 473, 102 S.Ct. at 759. In addition, qui tam plaintiffs have the requisite personal stake in the outcome of the case to ensure that the issues are presented sharply and that more than "the vindication of the value interests of concerned bystanders" is at issue. Id. This personal stake derives from the following three factors: (1) the qui tam plaintiff must fund the prosecution of the FCA suit; (2) the qui tam plaintiff receives a sizable bounty if he prevails in the action; and (3) the qui tam plaintiff may be liable for costs if the suit is frivolous. Kreindler & Kreindler, 985 F.2d at 1154.

Qui tam suits also are capable of judicial resolution. They involve allegations of fraud—an area of law that is neither novel nor extraordinarily complex. By resolving these suits, federal courts are not intruding into areas committed to the other branches of government. Instead, they are merely accommodating a congressional policy decision that relators may sue on behalf of the government for violations of the FCA. As we explain more fully in the next section of this opinion, in no way does this upset the tripartite allocation of power upon which our government is based. Givler, 775 F.Supp. 172, 180-81.

B. Separation of Powers.

We next consider whether the qui tam provisions of the FCA violate the principle of separation of powers. The FCA's grant of authority to private parties to sue in the name of the United States for injuries to the federal treasury is certainly anomalous with respect to normal divisions of authority. But the question in this case is not whether the qui tam provisions fit neatly into usual public power distribution patterns; rather, the question is whether the Constitution prohibits use of this mechanism of civil law enforcement. To answer that question, we must determine whether Congress, under its policymaking authority, may place the prosecution of claims based on injuries to the government under the direction of qui tam relators.[7] In other words, we must decide whether the separation of powers principle inherent in the structure of the Constitution proscribes assignment of this essentially prosecutorial function to private parties.

1. General Principles.

The principle that the various powers of government must be separated and assigned to coordinate branches is fundamental to our form of government. The Framers, aware that concentration of power breeds tyranny, embedded the separation of powers principle into the Constitution in order to preserve liberty. The Supreme Court has repeatedly pronounced upon the importance of this

[7] In United States, ex rel. Marcus v. Hess, 317 U.S. 537, 542, 63 S.Ct. 379, 383, 87 L.Ed. 443 (1943), the Supreme Court held, referring to the FCA qui tam provisions, that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it. . . ." We do not believe this to be conclusive authority on the questions we address in this opinion for several reasons: the Court did not squarely face the constitutional issues presented in our case; the Court's jurisprudence regarding these issues has developed significantly since 1943; and Congress has substantially amended the FCA twice since the Hess decision.

principle in our constitutional scheme. See e.g., Mistretta, 488 U.S. at 380, 109 S.Ct. at 659 ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); Morrison v. Olson, 487 U.S. 654, 693, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."); Freytag v. Commissioner of Internal Revenue, —— U.S. ——, 111 S.Ct. 2631, 2634, 115 L.Ed.2d 764 (1991); Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., —— U.S. ——, ——, 111 S.Ct. 2298, 2310, 115 L.Ed.2d 236 (1991).

The Supreme Court has also consistently recognized that "the Constitution by no means contemplates total separation" of the three branches of government. Buckley v. Valeo, 424 U.S. 1, 121, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976). Because the Court has acknowledged that a workable government requires a degree of interdependence and overlapping responsibility, the Court has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'" Morrison, 487 U.S. at 694, 108 S.Ct. at 2620 (quoting United States v. Nixon, 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974)). Nevertheless, the Court has "not hesitated to invalidate provisions of law which violate" the separation of powers principle. Id. 487 U.S. at 693, 108 S.Ct. at 2620; Buckley, 424 U.S. at 123, 96 S.Ct. at 684. We understand that, likewise, we must not hesitate to do so.

This case does not involve the type of separation of powers problem posed by one branch of government arro-

gating power at the expense of another. See Mistretta, 488 U.S. at 382, 109 S.Ct. at 660 ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' ") (citation omitted); Morrison, 487 U.S. at 693, 108 S.Ct. at 2620; Freytag, —— U.S. at ——, 111 S.Ct. at 2638. Instead, this case requires us to determine the extent to which the legislative branch may, while remaining within constitutional boundaries, diminish the executive branch's authority without taking any of that authority as its own.

The Supreme Court has recognized that the separation of powers doctrine can be violated by "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." Mistretta, 488 U.S. at 382, 109 S.Ct. at 660 (emphasis added). It is the second type of violation that is at issue in this case. Although the Supreme Court has had occasion to address whether an act of Congress has triggered this type of violation, see Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 856-57, 106 S.Ct. 3245, 3259-60, 92 L.Ed.2d 675 (1986) (case raised no question of congressional aggrandizement but instead question whether Congress impermissibly undermined role of judicial branch); Morrison, 487 U.S. at 694, 108 S.Ct. at 2621 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."), it has never considered a situation where Congress has sought to disperse some quantum of executive authority amongst the general public.

2. Applicable Tests.

The Supreme Court has established that where an act of Congress arguably threatens the integrity of another

branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. Schor, 478 U.S. at 856, 106 S.Ct. at 3260. This is the test which we apply to the qui tam provisions of the FCA. In other words, we must consider whether the qui tam provisions " 'disrupt [] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.' " Morrison, 487 U.S. at 695, 108 S.Ct. at 2621 (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977)). To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether, within the meaning expressed in Morrison, these provisions accord the Executive Branch "sufficient control" over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties." [8] Morrison, 487 U.S. at 696, 108 S.Ct. at 2622.

3. Comparison to Morrison v. Olson.

The authority most analogous to this case is Morrison v. Olson, in which the Supreme Court held that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the functions of the Executive Branch in violation of the separation of powers principle. 487 U.S. at 697, 108 S.Ct. at 2622. Morrison provides a baseline against which we may assess whether Congress has unconstitutionally diminished executive power by permitting private plaintiffs to sue in the name of the United States for an injury to the federal treasury. Comparison to Morrison is particularly useful because that case considers the degree to which Congress

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[8] For purposes of this case, the relevant presidential duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

may assign prosecutorial powers to persons not under the direct control of the Executive Branch.

Before comparing the qui tam provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that only the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law.[9] It is clear to us that no such absolute rule exists. Morrison itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695, 108 S.Ct. at 2621. The Court also stated in Morrison that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." 487 U.S. at 691, 108 S.Ct. at 2619 (emphasis added). Use of the word "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not always be

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[9] To support this proposition, Boeing cites dicta from several cases, including Buckley, 424 U.S. at 138, 96 S.Ct. at 691 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"), and Springer v. Philippine Islands, 277 U.S. 189, 202, 48 S.Ct. 480, 482, 72 L.Ed. 845 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.") We note that the Court in those cases was concerned with congressional encroachment on executive powers, and did not have before it any question (such as that presented here) concerning the role of private parties in an enforcement scheme.

undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's assertion that all prosecutorial power of any kind belongs to the Executive Branch.

Both sides in this litigation compare the degree of executive control over independent counsels to the degree of executive control over qui tam relators, yet they reach opposite conclusions. Boeing contends that Morrison stands at the outer limits of congressional authority to insulate government litigation from presidential control. Even accepting that proposition as true, however, we conclude that the FCA qui tam provisions do not exceed those limits. That is, the FCA permits a degree of executive control sufficient to satisfy the Morrison standard.

Each side in this case proposes a different approach to comparing the qui tam provisions to the independent counsel provisions. Boeing suggests that we should look at the precise means of executive control identified and found sufficient in Morrison, and then base our decision on the absence of those same means in the qui tam provisions. Kelly, on the other hand, suggests that we identify all possible means of executive control in the qui tam provisions, and then compare them in toto to the means of control identified in Morrison. We believe that under Morrison, Kelly's approach is the correct one. Twice in Morrison the Court stated that the proper inquiry is whether the Act "taken as a whole" violates the principle of separation of powers by unduly interfering with the President's constitutional role. 487 U.S. at 685, 693, 108 S.Ct. at 2615, 2620. Thus Morrison instructs us to compare the qui tam provisions "as a whole" to the independent counsel provisions "as a whole".

The powers of an independent counsel are quite broad. "With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.'" Morrison, 487 U.S. at 662, 108 S.Ct. at 2604, citing 28 U.S.C. § 594(a). The counsel's functions and powers include conducting grand jury proceedings and other investigations, initiating and conducting civil and criminal litigation, accepting referrals of matters from the Attorney General, framing and signing indictments, filing informations, appealing decisions, and handling all aspects of any case "in the name of the United States." 487 U.S. at 662, 108 S.Ct. at 2604. The counsel may also draw on public resources by appointing employees, and requesting and obtaining assistance from the Department of Justice. Id. In addition, "whenever a matter has been referred to an independent counsel under the Act, the Attorney General and the Justice Department are required to suspend all investigations and proceedings regarding the matter." Id. at 662-63, 108 S.Ct. at 2604, citing 28 U.S.C. § 597(a).

The powers of a qui tam relator vary depending on whether and when the government takes over the qui tam action. First, when a relator proceeds with a case in which the government has not intervened, the relator exercises the broadest possible authority the FCA permits. Such a relator has full power to conduct litigation of the particular case in the name of the United States, but only with the resources of a private plaintiff and subject to possible discovery limitations. Also, a relator who pursues a frivolous action can be ordered to pay the defendant's costs and attorneys' fees. On the other hand, when the government takes over a qui tam case from the outset, the FCA explicitly accords the government primary authority to conduct the case. Finally, when the govern-

ment intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start.[10] In comparison to any of these three situations, an independent counsel exercises broader investigative authority, prosecutorial discretion, and authority to use the resources of the U.S. government than does a qui tam relator.

Morrison identifies several means by which the Executive Branch can control an independent counsel's exercise of the powers outlined above. First, no independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request an appointment is unreviewable. Second, the Attorney General retains the power to remove an independent counsel, though only upon a showing of "good cause." The Act requires the Attorney General to submit a report to the Judiciary Committees of the House and the Senate and to a special court responsible for appointing independent counsels specifying the grounds for removal. Morrison, 487 U.S. at 663, 108 S.Ct. at 663 (citing 28 U.S.C. § 596(a)(2)). The Attorney General's removal authority is further limited by the Act's provision that an independent counsel can obtain judicial review of the Attorney General's removal action by filing

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[10] As mentioned in Part I.B. of this opinion, the parties dispute whether the government exercises the same degree of authority whether it intervenes at the outset or later. The statute is ambiguous on this point, but can, if necessary to preserve the constitutionality of the statute, be read to provide the government the same authority to dismiss or settle the suit regardless of when it intervenes. See Morrison, 487 U.S. at 682, 108 S.Ct. at 2614 (regarding interpretation of a provision not tested in practice, Court noted that "it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities . . . and to that end we think a narrow construction is appropriate here."); Schor, 478 U.S. at 841, 106 S.Ct. at 3251 (courts must construe federal statutes so as "to avoid serious doubt of their constitutionality") (internal quotation omitted).

a civil suit. The Act authorizes the reviewing court to grant reinstatement or "other appropriate relief." Id. at 663-64, 108 S.Ct. at 2605 (citing 28 U.S.C. § 596(a)(3)).

Third, the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment. However, it is the special court charged with appointing an independent counsel that actually defines the counsel's prosecutorial jurisdiction. Id. at 661, 108 S.Ct. at 2602 (citing 28 U.S.C. § 593(b)), 679.[11] Finally, the Act requires the counsel to abide by Department of Justice policies, unless it is not possible to do so. Morrison, 487 U.S. at 696, 108 S.Ct. at 2622. The Court concluded that these features give the Executive Branch "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." Id. (emphasis added). We note that the Court reached this conclusion despite the fact that the Attorney General's unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.

Under the FCA, the Executive Branch can control a qui tam relator's exercise of prosecutorial powers in several ways. The government can intervene in a case and then take primary responsibility for prosecuting the action; it can seek judicial limitation of the relator's participation; it can move for dismissal of a case which it believes has no merit,[12] after notice to the relator and opportunity for a hearing; it can seek a judicial stay of the

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[11] The Court held in Morrison that Article III does not prohibit Congress from vesting the Judicial Branch with power to define an independent counsel's jurisdiction as an incident to its power to appoint an independent counsel. Id. at 678-79, 108 S.Ct. at 2612-13.

[12] At least one district court has interpreted the FCA to permit the government to move for dismissal of a qui tam action without

relator's discovery regardless of whether it intervenes; and it remains free to seek any alternate remedies available, including through any administrative proceeding. 31 U.S.C. § 3730(c).

Several of the control mechanisms built into the qui tam provisions are qualified. For example, the government may dismiss an action in which it has intervened only after an objecting relator has had an opportunity for a hearing,[13] and may settle with a defendant only after

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actually intervening in the case. Juliano v. Federal Asset Disposition Ass'n, 736 F.Supp. 348 (D.D.C.1990), aff'd, 959 F.2d 1101 (D.C.Cir.1992). After four months of investigating Juliano's claims, the government filed a notice that it declined to take over the action as to some defendants, and that it moved to dismiss the others. Id. at 349. The court stated that in order to avoid serious constitutional questions which unduly curtailing the Attorney General's prosecutorial discretion would raise, it would interpret the Act's provision that the "Government may dismiss the action notwithstanding the objections" of the relator to apply to actions in which the government has not already intervened. Id. at 351. As the court aptly pointed out, the Act nowhere prohibits such an interpretation. See id. Though the specific question addressed in Juliano is not directly before us, we believe that the court's interpretation of the FCA is entirely appropriate and provides an illustration of the meaningful control which the Executive Branch can exercise over qui tam actions.

[13] It is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government. However, we note that Congress apparently intended that the provision authorizing relators to formally object to any motions to dismiss or proposed settlements between the government and defendant should not pose a significant burden for the government or courts. The Senate Judiciary Committee Report on the version ultimately passed of the 1986 amendments to the FCA stated: Any objections filed by the qui tam plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the qui tam relator shows a

a court has determined that the proposed settlement is "fair, adequate, and reasonable under all the circumstances." [14] 31 U.S.C. § 3730(c)(2)(A), (B). Furthermore, the government must show "good cause" in order to intervene in an action which has already commenced. Id. § 3730(c)(3). However, the only unqualified control built into the independent counsel provisions is that the Attorney General has unreviewable discretion to request appointment of a counsel, and therefore to initiate litigation by a counsel. Boeing argues that the power to initiate litigation is an important and exclusively executive function.[15] Clearly, the government has greater authority

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"substantial and particularized need" for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations. Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291.

[14] Significant precedent exists for the requirement that a court approve the government's decision to terminate a case brought on behalf of the United States. For example, Federal Rule of Criminal Procedure 48(a) requires the government to obtain leave of court to terminate a prosecution by dismissing an indictment, information or complaint. In addition, the government may settle a criminal case by plea bargain only with court approval. And finally, a court may enter a consent judgment proposed by the government in an antitrust action only if it is in the public interest. See United States, ex rel. Truong v. Northrop Corp., 728 F.Supp. 615, 622 (C.D.Cal.1989); United States, ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F.Supp. 1084, 1093 (C.D.Cal.1989).

[15] Boeing supports this proposition by citing to dicta in two cases, i.e., Heckler v. Chaney, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985) ("the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."), and United States v. Nixon, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974) (Court noted the argument of President's counsel that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). We do not believe

to prevent the initiation of prosecution by an independent counsel than by a qui tam relator. But once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately end the litigation in a qui tam action than it does in an independent counsel's action.[16] We conclude that because the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it can not prevent its start.

The Court in Morrison noted that even though the mechanisms just discussed give the Executive Branch sufficient control over an independent counsel, it "is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." Morrison, 487 U.S. 695, 108 S.Ct. at 2621. The Court specifically pointed out that the Act does not allow the Attorney General to appoint the individual of his or her choice, to determine the counsel's jurisdiction, or to remove a counsel at will. Id. at 695-96, 108 S.Ct. at 2621-2622. Likewise, we do not deny that the qui tam provisions of the FCA to some degree diminish Executive Branch control over the initiation and prosecution of a defined class of civil litigation. Nonetheless, we find that the Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels.[17] Thus, the FCA gives the Attor-

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these comments amount to an absolute rule that only executive officers may initiate any type of litigation in the name of the United States.

[16] The Attorney General can do no more than suggest to a court that it terminate the office of an independent counsel. Morrison, 487 U.S. at 664, 108 S.Ct. at 2605. By comparison, the government "may dismiss" a qui tam action "notwithstanding the objections" of the relator, as long as the relator has received notice and an opportunity for a hearing. 31 U.S.C. § 3730(c)(2)(A).

[17] The "jurisdiction" of a relator seems necessarily limited by the terms of the False Claims Act and the facts of the particular

ney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns.

In addition to considering whether the Ethics in Government Act taken as a whole violates the separation of powers principle, the Court in Morrison also specifically addressed whether the provision of the Act restricting the Attorney General's power to remove an independent counsel, taken by itself, impermissibly interferes with the President's exercise of his functions. 487 U.S. at 685, 108 S.Ct. at 2616. The Court held in Morrison that the "good cause" restriction on the Attorney General's power to remove an independent counsel does not violate separation of powers. Id. at 693, 108 S.Ct. at 2620. The essence of the Court's removal analysis in Morrison, based on its interpretation of prior removal jurisprudence, is an inquiry into whether Congress has impermissibly encroached on executive power by limiting presidential removal authority. Id. at 685-93, 108 S.Ct. at 2615-20. See also Bowsher v. Synar, 478 U.S. 714, 726, 106 S.Ct. 3181, 3187, 92 L.Ed.2d 583 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."). The Court found no such encroachment evident in the independent counsel provisions. Morrison, 487 U.S. at 691, 108 S.Ct. at 2619.

In light of the attention paid to the removal issue in Morrison, we have considered whether the lack of a provision permitting the government to "remove" a relator invalidates the qui tam provisions. Short of dismissing a qui tam action, the government can only seek limitation of a relator's participation in a case. 31 U.S.C. § 3730 (c)(2)(C). However, the concept of removal does not make sense in the qui tam context, in which there is no "office" from which to remove the relator and subse-

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case; thus the fact that the Attorney General plays a role in defining an independent counsel's jurisdiction but not a relator's does not set the two Acts apart.

quently fill with someone else. Cf. Morrison, 487 U.S. at 664, 108 S.Ct. at 2605 (discussing procedures for terminating the "office" of an independent counsel). In contrast to independent counsels, relators are not replaceable. Cf. id. at 662 n. 5, 108 S.Ct. at 2604 n. 5 (special court which appoints independent counsels authorized under 28 U.S.C. § 593(e) to fill vacancies due to death, resignation or removal of an independent counsel). The only practicable way to "remove" a relator is to end the qui tam litigation—and this the government has power to do. While the government's power to end qui tam litigation is qualified, so is the government's power to remove an independent counsel,[18] thus, these aspects of the two Acts are not meaningfully distinguishable for purposes of separation of powers analysis.

4. Judicial Encroachment.

We have discussed in the preceding the central separation of powers issue presented to us in this appeal—that is, whether Congress has impermissibly undermined the role of the Executive Branch by permitting private parties to exercise some measure of prosecutorial authority. We must also resolve a distinct, but in this case less difficult, separation of powers problem: whether the qui tam provisions disrupt the proper balance of power between the three branches by permitting the Judicial Branch to encroach on executive authority. We recognize the general rule that under Article III, courts may not exercise "executive or administrative duties of a non-

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[18] In holding that Congress's imposition of a "good cause" standard for removal does not unduly trammel on executive authority, the Court stated: Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President. Morrison, 487 U.S. at 691-92, 108 S.Ct. at 2619.

judicial nature." Buckley, 424 U.S. at 123, 96 S.Ct. at 684. The purpose of this rule is "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." Morrison, 487 U.S. at 680-81, 108 S.Ct. at 2613.

Boeing argues that the FCA gives federal courts too much control over whether the government may intervene later in a qui tam action which it initially declined to take over, because the Act requires the government to demonstrate "good cause" to do so. Boeing asserts that the "good cause" hurdle significantly interferes with the government's prosecutorial authority. Boeing attempts to support that assertion by noting that the court denied the government's intervention request in one out of only two cases of which it is aware in which the government has sought late intervention.[19] Boeing further argues that the FCA impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits.

We conclude that the judicial involvement which the FCA authorizes does not contravene the separation of powers principle. First, in the absence of any meaningful indication that these requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such and thereby heighten constitutional concerns. See note 8. Second, as we noted earlier, ample precedent exists for judicial oversight of the government's decision to dismiss a qui tam action. See note 12.

Furthermore, the extent of judicial involvement in the qui tam scheme is no greater than the extent of judicial

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[19] Unfortunately, Boeing did not provide us with a name or citation for that one case; thus, we are unable to verify whether the court did in fact deny the government's request for intervention or to consider the court's reasoning.

involvement in implementation of the independent counsel provisions of the Ethics in Government Act. The Court in Morrison held that the Constitution permits Congress to vest power in a special federal court to decide whom to appoint to the office of independent counsel, as well as to define a counsel's jurisdiction and perform a variety of other functions which, though "essentially ministerial," do require the exercise of some judgment and discretion. Morrison, 487 U.S. at 676-81, 108 S.Ct. at 2611-14. The Court also held that the special court's power to terminate the office of independent counsel is not a significant judicial encroachment on executive authority, even though it is not a typically judicial power and "has few analogues among the court's more traditional powers." Id. at 682, 108 S.Ct. at 2614. The Court explicitly construed the termination provision narrowly "in order to save it from constitutional infirmities," though it acknowledged that "an adventurous special court" conceivably could use its termination power aggressively. Id.

In light of Morrison, we believe it is not dispositive that no direct analogue exists for judicial authority to determine whether the government has demonstrated good cause to take over a case prosecuted in the name of United States.[20] This power may affect the government's prosecutorial discretion to some degree, but it does not amount to the power to supervise the prosecutorial conduct of either the Attorney General or a relator. Cf. Morrison, 487 U.S. at 681, 108 S.Ct. at 2614 ("The Act simply does not give the [special court] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") By comparison, we note that Morrison ap-

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[20] Federal courts do, however, routinely make evaluations which are similar to the intervention determination under the FCA. See Federal Rule of Civil Procedure 24(b) (permissive intervention). Of course, Rule 24(b) determinations do not raise the Article III concerns we address here.

proved a scheme in which the Attorney General relinquishes all unqualified prosecutorial discretion with respect to a matter referred to an independent counsel once he or she has decided to request appointment of a counsel. Moreover, Morrison specifically held that the provision that the Attorney General must show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by permitting excessive judicial involvement. Id. at 691, 108 S.Ct. at 2619.

Considering the matter with a practical eye, cf. Schor, 478 U.S. at 851, 106 S.Ct. at 3257 ("[I]n reviewing Articles III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."), we conclude that the FCA does not authorize the judiciary to infringe on prosecutorial authority to a degree beyond the bounds establish in Morrison. The government's authority to intervene at the outset of an action is unfettered; we have seen no indication that it is difficult for the government to show good cause to intervene late; and, in view of analogous authority, judicial oversight of the government's dismissal power is unremarkable.

5. Conclusion.

Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the Morrison Court found the Executive Branch exercises over independent counsels. Therefore, we conclude that the qui tam provisions of the FCA do not "impermissibly interfere" with the President's exercise of his constitutionally assigned duties. Nor do the provisions disrupt the "proper balance" between the branches, because, like the Ethics in Government Act, the FCA permits the Executive Branch

to retain "sufficient control" over prosecutorial functions.[21] Finally, the provisions do not authorize constitutionally impermissible judicial encroachment on executive power.

C. Appointments Clause.

The third constitutional question we consider is whether the qui tam provisions of the FCA violate the Appointments Clause.[22] This case does not present the usual situation raising an Appointments Clause problem—that is, where the power to appoint is placed in the hands of the wrong branch or governmental entity. In other words, this case does not present a question of improper diffusion or arrogation of appointment power. Rather, it requires us to inquire whether completely unappointed qui tam relators wield so much governmental power that they must be appointed in conformity with the Appointments Clause.

The purpose of the Appointments Clause is to limit congressional discretion to disperse the power to appoint, and thereby preserve the Constitution's structural integrity. Freytag, —— U.S. at ——-——, ——-——, 111 S. Ct. at 2638-39, 2641-42. Under Buckley, persons who are not appointed by a body with proper appointment

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[21] Boeing raises the specter of Congress enacting an unlimited series of qui tam provisions if this court finds the qui tam provisions in the FCA to be constitutional. However, this pure speculation about the policy choices Congress might attempt to make does not weigh into our constitutional analysis. Furthermore, it is unlikely that in other areas of civil law enforcement a similarly concrete, identifiable injury to the U.S. treasury as exists in the FCA context would exist as a basis for standing.

[22] Art. II, § 2, cl. 2 of the U.S. Constitution provides: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

authority, and who therefore can not be considered "Officers of the United States," may not discharge functions that are properly discharged only by "officers". 424 U.S. at 140, 96 S.Ct. at 692. The test which Buckley provides to assess whether persons exercise authority which can only properly belong to appointed "officers" is whether those persons "exercis[e] significant authority pursuant to the laws of the United States." Id. at 126, 96 S.Ct. at 685. The Court held in Buckley that statutory provisions vesting in the Federal Election Commission "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violate the Appointments Clause because only officers may perform such functions. Id. at 140, 96 S.Ct. at 692.

The appropriate questions in this case, therefore, are whether qui tam relators exercise "significant authority" under the FCA, and whether the FCA vests in relators "primary responsibility" for enforcing the Act by litigating in the federal courts. Our answers to these questions follow logically from our determination, explained in Section III.B., that the qui tam provisions do not violate the separation of powers principle. We have concluded that the Executive Branch retains "sufficient control" of relators such that their exercise of authority to sue on behalf of the United States does not "impermissibly undermine" executive functions. In keeping with that conclusion, we find it impossible to characterize the authority exercised by realtors as so "significant" that it must only be exercised by officers appointed in the manner which Article II, § 2, cl. 2 prescribes. See Buckley, 424 U.S. at 126, 96 S.Ct. at 685. Linking our Appointments Clause and separation of powers analyses in this manner is appropriate in light of the fact that the Supreme Court has interpreted the Appointments Clause to serve the purpose of maintaining the separation of powers in the constitutional scheme. Freytag, —— U.S. at ——, ——, 111 S.Ct. at 2638, 2641 ("The principle of separation of powers is embedded in the Appointments Clause."); See Buckley, 424 U.S. at 120, 124, 96 S.Ct. at 682, 684.

Boeing and amici supporting its position argue, citing Buckley, that only officers of the United States may litigate on behalf of the government. We do not believe Buckley can fairly be read to state an unequivocal rule that only officers may exercise any prosecutorial authority in the name of the United States. Instead, Buckley, properly construed, directs only that persons who have "primary responsibility" and "significant authority" to enforce a law through litigation must be considered officers. Buckley, 424 U.S. at 126, 140, 96 S.Ct. at 685, 692.

As Kelly correctly points out, the qui tam provisions do not contravene Buckley's rule. The fact that relators sue in the name of the government does not vest them with any governmental powers; they conduct litigation under the FCA with only the resources of private plaintiffs. Furthermore, relators have no greater authority to enforce the FCA than does the Attorney General, and under the terms of the statute must yield to the government's assumption of "primary responsibility" when it elects to intervene in a qui tam action. 31 U.S.C. § 3730(c)(1). When the government does not intervene, a relator retains primary responsibility for the litigation, thus presenting what may seem a close question under Buckley; but even in that situation, the relator's responsibility only extends to a single case, and the relator's activities can still be limited by the court upon the request of either the government or the defendant.[23] Thus, the qui tam scheme does not threaten the interest in preventing the exercise of unchecked or unbalanced government power which underlies the Appointments Clause. Moreover, the Court's central point in

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[23] In addition, as the district court below pointed out, a relator "is not appointed by Congress, receives no federal salary, and serves for no specified term." Order denying dismissal at 7. These factors distinguish relators from "officers". See Auffmordt v. Hedden, 137 U.S. 310, 327, 11 S.Ct. 103, 108, 34 L.Ed. 674 (1890) (person is not an "officer" within meaning of Appointments Clause where his "position is without tenure, duration, continuing emolument, or continuous duties").

Buckley was that Congress may not arrogate power to itself by appointing officers who perform executive functions. The Court held that the Federal Election Commission could not exercise the powers conferred upon it precisely because Congress exceeded its authority by vesting itself with power to appoint the commissioners. Buckley, 424 U.S. at 143, 96 S.Ct. at 693. Such concerns about congressional aggrandizement simply are not implicated in this case.

We conclude that a qui tam relator, who litigates only a single case, does not have "primary responsibility" within the meaning of Buckley for enforcing the FCA. Nor does a relator exercise authority so "significant" that the Constitution only permits an officer of the United States to exercise it. Therefore, the qui tam provisions do not violate the Appointments Clause.

D. Due Process.

The final question before us is whether the qui tam provisions of the FCA violate the Due Process Clause of the Fifth Amendment. Boeing argues that the FCA violates Boeing's right not to be deprived of property without due process,[24] because it permits financially interested relators to prosecute the company on behalf of the government. Boeing contends that the Act's promise of a reward to relators for successful prosecution creates a conflict of interest between a relator's desire for pecuniary gain and duty as a prosecutor performing "government functions" to seek a just and fair result. Because the government is the real party in interest, Boeing asserts, a relator must "place justice above competing objectives." Brief of Appellant at 10.

Boeing does not cite persuasive authority for its position. In one case on which Boeing relies, Marshall v.

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[24] The Fifth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, or property, without due process of law." U.S. Const. amend. V.

Jerrico, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), the Supreme Court did state that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." Id. at 249-50, 100 S.Ct. at 1617. However, the Court found no due process violation in the case before it, in which the Court determined that prosecutors enforcing the child labor provisions of the Fair Labor Standards Act had only an exceptionally remote financial incentive for securing civil penalties. Id. at 250, 100 S.Ct. at 1617. Thus, the Court explicitly declined to state the "limits there may be on a financial or personal interest of one who performs a prosecutorial function." Id. In addition, the Court noted that "[p]rosecutors need not be entirely 'neutral and detached' . . . . In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests . . . are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." Id. at 248-49, 100 S.Ct. at 1616. Boeing's contention that the Marshall Court "strongly suggested" that the Due Process Clause prohibits civil prosecutions by financially interested prosecutors is exaggerated, and does not support a finding of a due process violation here.

Also, Boeing's reliance on Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), is misplaced. The Court held in Young that courts generally may appoint private attorneys to prosecute criminal contempt charges, but that the district court in the particular case before it erred in appointing attorneys who were counsel for an interested party in the underlying litigation. Id. at 793, 802, 107 S.Ct. at 2130, 2135. However, only Justice Blackmun in a concurring opinion stated that the error amounted to a due process violation. Id. at 815, 107 S.Ct. at 2141

(Blackmun, concurring). Young, in addition, is distinguishable from the present case in that it involved criminal prosecution, and therefore arguably required a higher level of prosecutorial disinterest than would be necessary in a civil enforcement action under the FCA. See id. at 808, 107 S.Ct. at 2138 (noting criminal nature of litigation in question).

Furthermore, the type of conflict of interest at issue in Young is simply not extent in the qui tam situation, where private and public goals are congruent. In Young, the Court observed that a private attorney appointed to prosecute a criminal contempt action "is appointed solely to pursue the public interest in vindictaion of the court's authority . . . [and] therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." Id. at 804, 107 S.Ct. at 2136. But in the FCA context, Congress has created a scheme in which the interests of the private prosecutor (that is, the relator) coincide with the public interest in remedying harm to the federal treasury. Under the explicit terms of the Act, a qui tam action is taken on behalf of both the government and the relator, indicating that the two share a single interest in successful litigation. See 31 U.S.C. § 3730(b). Indeed, the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting.

Moreover, contrary to Boeing's suggestion, it is not at all clear that qui tam relators are bound to fulfill the same type of public duty as government prosecutors. The statutory terms of the FCA do not impose such a duty nor do relators owe a duty by virtue of holding a public "office". Furthermore, the fact that relators sue in the name of the United States does not mean that they wield governmental powers and therefore owe the same type of duty to serve the public interest as government prosecutors. First, the fact that relators sue in the name of the

government is significant only with respect to their standing to sue; based on the terms of the statute, in no way does this fact otherwise affect the conduct of qui tam litigation. Second, unlike public prosecutors, relators do not have the "power to employ the full machinery of the state in scrutinizing any given individual." Young, 481 U.S. at 814, 107 S.Ct. at 2141; see id. at 811, 107 S.Ct. at 2140 ("terrible array of coercive methods" is available to prosecutors, including police investigation and interrogation, warrants, immunized informers and agents, authorized wiretapping, civil investigatory demands, and enhanced subpoena power.) Qui tam relators pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action. Thus, qui tam litigation does not implicate due process concerns.

IV. CONCLUSION

We conclude that the qui tam provisions of the False Claims Act do not conflict with Article III of the Constitution, nor violate the principle of separation of powers, the Appointments Clause, or the Due Process Clause.[25] Accordingly, we affirm the district court's denial of Boeing's motion to dismiss.

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[25] The parties and amici devote considerable attention to arguments concerning the historical pedigree of qui tam actions. The two sides in this case present conflicting portraits of that pedigree. Obviously, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." Marsh v. Chambers, 463 U.S. 783, 790, 103 S.Ct. 3330, 3335, 77 L.Ed.2d 1019 (1983). But historical factors can affect a court's decision where there is significant evidence of an "unambiguous and unbroken history" of practice dating from the framing of the Constitution. Id. at 790-92, 103 S.Ct. at 3335-36. The evidence presented by those urging affirmance in this case does not appear to rise to that level. In any event, because we find no constitutional violations here, we need not consider the historical arguments at all.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1732R

UNITED STATES OF AMERICA, *ex rel.*, KEVIN G. KELLY,
Plaintiff,

v.

THE BOEING COMPANY, a Delaware Corporation,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

[Filed June 3, 1992]

THIS MATTER comes before the court on defendant's motion to dismiss. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiff Kevin Kelly filed this *qui tam* action on behalf of the United States against defendant Boeing Company pursuant to the False Claims Act, 31 U.S.C. §§ 3729 *et seq*, to recover statutory penalties for fraud committed against the United States.[1] The False Claims Act provides

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[1] In 1986, defendant awarded a contract for construction and lease of work space for development of the Advanced Tactical Fighter and B-2 bomber to Sabey Corporation. Plaintiff was employed by defendant as a technical designer. Plaintiff alleges that various costs incurred by defendant in connection with the new

that any person who submits a fraudulent claim for payment to the government "is liable to the United States Government for a civil penalty [plus] three times the amount of damages which the Government sustains." 31 U.S.C. § 3729. The *qui tam* provisions of the False Claims Act authorize a private party to "bring a civil action for a violation of section 3720 for the person and for the United States Government." 31 U.S.C. § 3730 (b)(1).

Defendant moves to dismiss plaintiff's statutory claims, arguing that the *qui tam* provisions of the Act are unconstitutional. Plaintiff also has asserted a state law claim for wrongful discharge, which defendant argues is preempted by the statutory remedy provided under the False Claims Act, 31 U.S.C. § 3730(h).

II. DISCUSSION

A motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *King v. California*, 784 F.2d 910, 912 (9th Cir. 1986), *cert. denied*, 484 U.S. 802 (1987).

A. *Constitutional Challenge to False Claims Act*

When reviewed for constitutional infirmities, congressional enactments are presumptively valid. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980).

> " 'When [a federal court] is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a

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site were unreasonable, and that these unreasonable costs are being billed to the government as overhead.

> deeply vexing national problem, it should only do so for the most compelling constitutional reasons.' "

Mistretta v. United States, 488 U.S. 361, 384 (1989) *quoting Bowsher v. Synar,* 478 U.S. 714, 736 (1986) (Stevens, J., concurring).

Defendant asserts four bases for its constitutional challenge: (1) that the False Claims Act violates the separation of powers doctrine; (2) that Congress "appoints" the *qui tam* relator to prosecute the action without satisfying the requirements of the appointments clause of Article II; (3) that the relator lacks standing because he has not suffered an injury in fact; and (4) that prosecution of the matter by a private party with a financial interest in the case violates due process. The court will consider each challenge in turn.

1. *Separation of powers*

Under Article II, section 3, of the Constitution, the President "shall take care that the laws be faithfully executed." The executive's power to enforce the laws of the United States includes authority to investigate and litigate offenses against the United States. *Buckley v. Valeo,* 424 U.S. 1, 138-39 (1974). All suits brought by or on behalf of the United States, "so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney General." *Id.* at 139. However, the Supreme Court has upheld Congressional enactments that delegate the power, authority, and discretion to initiate a lawsuit on behalf of the United States. *See Morrison v. Olson,* 487 U.S. 654, 696-97 (1988) (upholding against separation of powers and appointments clause challenges the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-99). The constitutional test is whether the statute "impermissibly undermine[s] the powers of the executive," *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 856 (1986), or

"disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions. *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977).

Since the False Claims Act does not empower Congress in any way to control or supervise *qui tam* actions,[2] the court finds that the statute does not create a danger of congressional usurpation of executive functions. *See Morrison,* 487 U.S. at 694.

Next, the court must examine whether the Act works a "judicial usurpation of properly executive functions." *Morrison,* 487 U.S. at 695. Defendant argues that if the government elects not to proceed with the lawsuit, section 4740(c)(3) accords the relator full discretion to control the scope of the litigation, and the government is barred from intervening unless the court finds "good cause." [3] De-

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[2] The *qui tam* plaintiff must file his or her complaint in camera, not to be served on defendant until the court orders. 31 U.S.C. § 3730(b)(2). The government has a minimum of sixty days to investigate plaintiff's claims, 31 U.S.C. § 3730(b)(2), and is entitled to an extension of the investigatory period upon a showing of good cause. 31 U.S.C. 3730(b)(3). During the investigatory period, if the government concludes that the action is without merit, it may intervene and dismiss. *See* 31 U.S.C. § 3730(b)(4) and (c)(2)(A). At the end of the investigatory period, the government elects whether to intervene and pursue the action, or allow the case to go forward under the aegis of the *qui tam* plaintiff. 31 U.S.C. § 3730(b)(4).

If the government elects non-intervention, the Attorney General continues to receive copies of all pleadings and copies of deposition transcripts. *See* 31 U.S.C. § 3730(c)(3). The government may make an *in camera* motion to stay ongoing discovery where such discovery threatens to interfere with the government's prosecution of another case. The government may file amici briefs in the *qui tam* action. The government can intervene at upon a showing of good cause. 31 U.S.C. § 3730(c)(3).

[3] Section 3730(c)(3) provides: "If the Government elects not to proceed with the action, the person who initiated the action

fendant contends that the good cause requirement works a judicial usurpation of an executive function. Defendant does not argue that there is a genuine danger that the government will be denied the right to intervene, but rather that the good cause requirement is a usurpation of power in theory. The court finds that the good cause requirement is an extremely limited standard of review, which in practical terms will prove to be a small hurdle. *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1092 (C.D. Cal. 1989). The court is unpersuaded that the good cause requirement constitutes a judicial usurpation of executive power.

Finally, the court finds that the Act does not "'impermissibly undermine' the powers of the Executive Branch." *Morrison*, 487 U.S. at 654 (quoting *Schor*, 478 U.S. at 856). Defendant argues that the statute precludes the court from taking any action that would limit "the status and rights of the person initiating the action," *see* 31 U.S.C. § 3730(c)(3), and that this language bars the government from intervening and moving to dismiss the *qui tam* action. However, the court rejects defendant's interpretation of the phrase "without limiting the status and rights of the person initiating the action." After intervention, the relator retains the same status and rights as a litigator that he or she had before the government intervened. The relationship between the relator and the government after intervention is the same as if the government had elected to proceed in the first instance,

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shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

in which case the government is expressly authorized to move for dismissal. *See* 31 U.S.C. § 3730(c)(2)(A) (government may dismiss action notwithstanding objections of person initiating action if that person is notified of motion to dismiss and given opportunity for hearing).

Other courts that have confronted the separation of powers challenge to the False Claims Act have upheld the statute. *See United States ex rel. Newsham v. Lockheed*, 722 F. Supp. 607, 612 (N.D. Cal. 1989); *Stillwell*, 714 F. Supp. at 1091; *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 621 C.D. Cal. 1989); *United States Dept. of HUD ex rel. Givler v. Smith*, 775 F. Supp. 172, 177 (E.D. Pa. 1991). This court joins the weight of authority, and rejects defendant's separation of powers challenge.

2. *Appointments clause*

Defendant argues that litigation on behalf of the government must be conducted by an officer of the United States appointed under the Appointments Clause of Article II, section 2, clause 2.[4] The Supreme Court has held that under the Appointments Clause, Congress cannot enact legislation empowering it to "enforce [the laws] or appoint the agents charged with the duty of such enforcement." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976). The statute at issue in *Buckley*, the Federal Election Campaign Act, created a standing commission with authority to enforce federal election laws. The commission's mem-

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[4] The Appointments Clause, U.S. Const. art. II, section 2, cl. 2, provides in pertinent part that:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

bers were appointed by Congress, served for a specified tenure, and drew a federal salary. The *qui tam* provisions of the False Claims Act differ from the Federal Election Campaign Act in that the *qui tam* relator is not appointed by Congress, receives no federal salary, and serves for no specified term. The relator is only given authority to sue under the False Claims Act in his or her individual case. The *qui tam* relator is more appropriately classified as an agent than an officer for purposes of Appointments Clause analysis. *See Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (person whose position is without tenure, duration, continuing emolument, or continuous duties, and acts only temporarily is agent not officer).

Defendant's expansive reading of *Buckley* would implicitly invalidate all *qui tam* statutes. This court, like others before it, rejects such a reading of *Buckley*. *See, e.g., Truong*, 728 F. Supp. at 623; *Stillwell*, 714 F. Supp. at 1095.

3. *Standing*

The False Claims Act authorizes a private party to bring an action "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Defendant argues that the *qui tam* relator has not suffered any injury in fact, and challenges the statutory grant of standing to the relator.

Federal jurisdiction is limited to cases and controversies. U.S. Const. Art. III. In order to insure the requisite degree of adverseness, the plaintiff must establish that he or she has a personal stake in the litigation. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). Plaintiff must show an actual or threatened injury that is fairly traceable to defendant's action, and that is likely to be redressed if the requested relief is granted. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Congress may create a legal interest and confer standing to assert that interest. *See Trafficante v. Metro-*

politan Life Ins. Co., 409 U.S. 205, 208-09 (1972). However, Congress cannot lower the threshold requirements of standing under Article III. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487-88 n. 24 (1982).

Every court that has faced a standing challenge to the *qui tam* provisions of the False Claims Act has upheld the statute. The Supreme Court has considered *qui tam* statutes, and has never questioned the standing of a *qui tam* relator. Federal district courts have applied several theories in upholding the *qui tam* provisions of the False Claims Act against standing challenge. In *United States ex rel. Truong v. Northrop Corp.*, the court declined to apply the injury-in-fact standard to the *qui tam* plaintiff where the presence of injury to the government is not disputed. *Truong*, 728 F. Supp. at 618-19 (if there is evidence of palpable injury to entity on whose behalf and in whose name suit is brought, it is superfluous to require that relator be individually aggrieved). In *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, the court held that the relator was entitled to sue under a statutory grant of standing for the injury to the United States. *Stillwell*, 714 F. Supp. at 1098. The requirement that the relator have a personal stake in the outcome of the litigation was satisfied by the statutory bounty provision. *Id.* In *United States Dept. of HUD ex rel. Givler v. Smith*, the court found that the purposes of modern standing doctrine were served by the *qui tam* provisions of the False Claims Act. *Givler*, 775 F. Supp. at 180. The court rejects defendant's standing challenge.

4. *Due process*

Defendant argues that because plaintiff is suing on behalf of the United States government and is not subject to the same rules and constraints as a public prosecutor, defendant will be deprived of its Fifth Amendment right to due process if the *qui tam* action proceeds. The court

is unimpressed with defendant's concern that somehow a private plaintiff will pursue unethical means in *qui tam* and thus deprive defendant of due process. The *qui tam* plaintiff's role is sufficiently different from that of a public prosecutor so as not to implicate due process. Since the relator pursues only one case, there is no question as to disparate treatment of potential defendants.

B. *Preemption challenge to wrongful discharge claim*

Plaintiff asserts a statutory claim for wrongful discharge under 31 U.S.C. § 3730(h) and a state law claim for wrongful discharge in violation of public policy. Section 3730(h) provides in pertinent part as follows:

> "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole." 31 U.S.C. § 3730(h).

Defendant argues that the state law claim is preempted by the federal statutory claim. Plaintiff responds that a jury could find for him on his state law claim even if it finds against him on the § 3730(h) claim, and that the state law claim therefore is not preempted.

A cause of action for wrongful discharge in violation of public policy may or may not be preempted when the public policy is declared in a statute providing a remedy. *See Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn. 2d 46, 54, 821 P.2d 18 (1991). In determining whether the statute is the exclusive means of redress, the court considers "the comprehensiveness, or adequacy,

of the remedy provided" by the statute. *Wilmot*, 118 Wn. 2d at 61.

The statutory remedy under § 3730(h) provides a comprehensive remedy for retaliation by defendant. The court finds that plaintiff's state law wrongful discharge claim is preempted by the federal remedy, and will grant defendant's motion to dismiss with respect to this claim.

NOW, THEREFORE, it is ORDERED as follows:

(1) Defendant's motion to dismiss is GRANTED IN PART AND DENIED IN PART as follows:

(a) Defendant's motion to dismiss plaintiff's Washington State common law wrongful discharge claim is GRANTED;

(b) With respect to all other claims of plaintiff, defendant's motion to dismiss is DENIED.

DATED at Seattle, Washington this 3rd day of June, 1992.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1732R

UNITED STATES OF AMERICA, ex rel. KEVIN G. KELLY,
Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation,
Defendant.

ORDER CERTIFYING INTERLOCUTORY APPEAL

[Filed June 17, 1992]

The Court, having considered the parties' Stipulated Request to Certify Immediate Appeal, Boeing's Motion for Certification, the Court's June 3, 1992 Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, and the records and files herein, finds and concludes as follows:

1. Boeing filed a motion to dismiss asserting four separate constitutional challenges to the *qui tam* provisions of the False Claims Act: separation of powers, Appointments Clause, due process and standing. The Court entered an order on June 3, 1992, rejecting defendant's constitutional challenges.

2. These four constitutional issues are controlling issues of law. A ruling in favor of defendant on any one of these issues is dispositive of the case and would result

in dismissal of plaintiff's *qui tam* claims which constitute the first cause of action.

3. There is substantial ground for difference of opinion concerning each of the four constitutional issues raised by defendant.

4. Immediate appeal of these constitutional issues may materially advance the ultimate termination of this litigation. A ruling in defendant's favor and consequent dismissal of plaintiff's first cause of action would substantially reduce the number and complexity of issues in this case.

5. Immediate appellate resolution of these constitutional issues would serve judicial economy beyond this case. Hundreds of *qui tam* cases have been filed since the 1986 amendments to the False Claims Act, many of them in the Ninth Circuit. An appellate level decision that the Act is unconstitutional would result in termination of many pending cases.

6. The United States District Court for the Central District of California recently certified an immediate appeal of the separation of powers, Appointments Clause and standing issues in *United States ex rel. Madden v. General Dynamics,* No. CV 88-05352 WMB (C.D. Cal.). The application to file an interlocutory appeal in *Madden* is still pending. *Madden,* however, does not raise the due process issue—an issue of first impression—raised in this case.

7. It would serve judicial economy for the Ninth Circuit to consider this case at the same time it considers *Madden* so that it can address the due process issue when it rules on the other constitutional challenges.

IT IS THEREFORE ORDERED, pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a), that the Court's order of June 3, 1992, granting in part and denying in part defendant's motion to dismiss, is amended

by adding the following paragraph at the end of Section IIA:

> The Court is of the opinion that the four constitutional issues raised by defendant are controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. Therefore, the Court certifies an interlocutory appeal of the constitutional issues as provided in 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a).

The clerk of the court is directed to forward uncertified copies of this order to counsel of record.

DATED this 17th day of June, 1992.

/s/ Barbara J. Rothstein
HONORABLE BARBARA J. ROTHSTEIN
United States District Judge

Presented by:

PERKINS COIE

By /s/ M. Margaret McKeown
M. MARGARET MCKEOWN
MARC A. BOMAN
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THE BOEING COMPANY
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Agreed as to form:

SCHROETER, GOLDMARK & BENDER

By /s/ Phillip Benson — by M. McKeown
WILLIAM RUTZICK — per 6/17/92
MICHAEL WITHEY — T/C authorization

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KEVIN G. KELLY

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-80189

DC# CV-89-1732-R
Western Washington
(Seattle)

UNITED STATES OF AMERICA, ex rel. KEVIN G. KELLY,
Plaintiff-Respondent,

vs.

THE BOEING COMPANY, A DELAWARE CORPORATION,
Defendant-Petitioner.

ORDER

New Case No.: 92-36660

[Filed Aug. 26, 1992]

Before: BRUNETTI and KLEINFELD, Circuit Judges

The petition for permission to appeal under 28 U.S.C. § 1292(b) is granted. *See In re: Cement Antitrust Litigation (MDL No. 296)*, 73 F.2d 1020 (9th Cir. 1982). Petitioner shall perfect its appeal pursuant to Fed. R. App. P. 5(b).

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE II OF THE UNITED STATES CONSTITUTION

Section 1. The executive Power shall be vested in a President of the United States of America.

* * * *

Section 2. [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * *

Section 3. [The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

ARTICLE III OF THE UNITED STATES CONSTITUTION

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

* * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Con-

suls;—to all Cases of admirality and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

31 U.S.C. § 3729 (1988)

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information.

and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

31 U.S.C. § 3730 (1988 and Supp. III 1991)

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of

harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Gov-

ernment has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report. hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10

percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice

the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section [1] paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit,

[1] So in original.

or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.